90-498
No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF SOUTH CAROLINA,

Petitioner,

vs

HORACE BUTLER,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE FIFTH AMENDMENT RIGHT NOT TO BE COMPELLED TO BE A WITNESS AGAINST HIMSELF VIOLATED WHEN A DEFENDANT DOES NOT TESTIFY AFTER THE TRIAL JUDGE ADVISES HIM THAT THERE IS A RISK THE JURY MAY WONDER WHY HE DID NOT TESTIFY?

II. WHETHER THE STATE COURT'S APPLICATION OF A PRESUMPTION OF PREJUDICE STANDARD IS APPROPRIATE FOR A VIOLATION OF A FIFTH AMENDMENT RIGHT NOT TO TESTIFY WHEN THE DEFENDANT DOES NOT TESTIFY AFTER THE ALLEGED COERCIVE JUDICIAL COMMENTS TO HIM?

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The Attorney General of South Carolina on behalf of the State of South Carolina petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina which granted the writ of habeas corpus and remanded the matter to the Charleston County Court of General Sessions for a new trial.

OPINION BELOW

The opinion of the Supreme Court of South Carolina granting the petition for a writ of habeas corpus in its original jurisdiction was filed on June 20, 1990. The opinion is unreported at the time of this filing of a petition for certiorari. It is appended hereto as Appendix A at pages 35-40.

JURISDICTION

The petition for certiorari is for review of the opinion of the Supreme Court of South Carolina which granted a petition for writ of habeas corpus in its original jurisdiction from a criminal conviction for murder which occurred on January 24, 1981. This Court has jurisdiction to review the lower court opinion in certiorari proceedings pursuant to 28 U.S.C. Section 1257(3) and Rules of the Supreme Court of the United States, Rule 10.1(b), (c).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(Emphasis added).

2. The Sixth Amendment to the United States Constitution which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

> accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

This petition for certiorari comes before this Court involving habeas corpus proceedings in the original jurisdiction of the Supreme Court of South Carolina occurring after this Court had denied a previous federal habeas corpus request on the part of Horace Butler in Butler v. McKellar, et al., ___U.S.___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990).

1. Prior Procedural History.

On or about July 17, 1980, Pamela Lane, a seventeen-year old convenience store clerk, was murdered in Charleston County, South Carolina. On September 1, 1980, Horace Butler made a statement admitting his involvement in her murder to the Charleston County Police Department.

After an indictment for murder, the matter was tried before a jury and the Honorable C. Anthony Harris. A verdict of guilty was returned on January 24, 1981. On January 26, 1981, the trial jury further recommended imposition of the death penalty after finding beyond a reasonable doubt the existence of the statutory aggravating circumstance of murder was committed while in the commission of the crime of rape.

Butler filed an appeal to the Supreme Court of South Carolina which affirmed the conviction and sentence on February 22, 1982. State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982). Certiorari was denied by this Court on October 12, 1982. Butler v. South Carolina, 459 U.S. 932 (1982).

Butler then made an application for state post conviction relief. Among the allegations raised one concerned his desire to testify in front of the jury in

desire to testify in front of the jury in the guilt phase of the trial. After hearing the testimony of the defense attorney and Butler, the Honorable Richard E. Fields, Presiding Judge, made the following findings of fact and conclusions of law:

> The Applicant also alleges that he desired to testify in the guilt stage in front of the jury about the circumstances of his statement. During the trial, the trial court made inquiry of the Applicant about his decision not to testify. (Tr. pp. 871-877). During the inquiry, the Applicant testified that he agreed with his lawyer's strategy not to have him testify, understanding the advantages and disadvantages. (Tr. pp. 871-872, 874-875). His statements in open court carry a presumption of verity which the applicant has wholly failed to rebut in this proceeding. Blackledge v. Allison, 431 U.S. 63 (1977). This Court finds that counsel made an informed decision not to call the Applicant in the guilt phase to testify. Counsel's tactical decision was based upon the Applicant's version of the facts, the effect of the reply testimony of Margo Brown, his ex-girlfriend, could give and

> Court, in hindsight, cannot find counsel performed outside of the standard of competence in not urging the Applicant to testify. His allegation must be denied.

Butler v. State, Court of Common Pleas (Honorable Richard E. Fields), January 28, 1984. (Butler v. McKellar., 88-6677, Joint Appendix, p. 84). An appeal was taken from the denial of state post conviction relief on this claim and other issues. After the denial of state court certiorari on some issues, the Supreme Court of South Carolina denied the appeal on August 27, 1985. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Certiorari was denied by this Court on January 26, 1986. Butler v. State, 474 U.S. 1093 (1986).

On May 2, 1986, Butler made a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. On June 9, 1987, the Honorable G. Ross Anderson, Jr.,

United States District Judge, denied the Petition. Butler v. Aiken, C.A. No. 86-1093-3 (D.S.C. 1987). Upon appeal, the United States Court of Appeals for the Fourth Circuit affirmed the denial of habeas corpus relief on May 6, 1988. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988). On December 2, 1988, the Court of Appeals entered its order denying the petition for rehearing and petition for rehearing en banc, Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988). Certiorari was sought and granted on an unrelated issue. On March 5, 1990, the Supreme Court of the United States entered its opinion affirming the judgment of the Court of Appeals denying the petition for habeas corpus. Butler v. McKellar, ___U.S.___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). Rehearing was denied on April 23, 1990.

2. Present Proceedings.

After the denial of the petition for rehearing in this Court, Butler filed a petition for writ of habeas corpus in the original jurisdiction of the Supreme Court of South Carolina, styled Horace Butler v. Parker Evatt, Commissioner of the South Carolina Department of Corrections, and T. Travis Medlock, Attorney General of South Carolina. In the pleading, Butler contended that the trial judge's comments to Butler (out of the jury's presence) on how a jury may or may not view a defendant's decision not to testify was a violation of his Fifth Amendment rights, relying upon the decisions of the Supreme Court of South Carolina in State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707, 710 (1986); and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441, 443 (1986). The State of South Carolina made its Return to the

Petition on May 29, 1990, contending, among other things, that the comments by the trial judge did not violate his Fifth Amendment rights to protect against compelled self-incrimination because Butler did not testify and the trial judge's comments did not deprive him of a fundamentally fair trial.

On June 20, 1990, the Supreme Court of South Carolina entered its order granting the petition for writ of habeas corpus. (Appendix A, pp. 35-40). The court stated "although we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief."

3. Pertinent Facts to these Proceedings.

The issue before this Court concerns the 1981 trial judge's inquiry of Horace Butler concerning his decision not to

testify before the jury in the guilt phase of his capital murder trial. The record reveals that after the prosecution had rested its case, the defense presented three defense witnesses and then the defense counsel expressed his desire to conclude its case. Outside of the jury's presence, the trial judge inquired of the defendant, Horace Butler, as to whether he understood his counsel's statement that he did not intend to testify and whether he agreed with that strategy. (Tr. p. 871, l. 21 - p. 872, l. 2). The court further inquired of whether he understood his right to not testify and his right to testify. (Tr. p. 871, l. 3 - p. 877, l. 2). This colloquy is set forth in full at Appendix B, pp. 41-50). Particularly, the trial judge made the following inquiry:

> Court: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not

testifying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

Mr. Hill: He doesn't understand, Your Honor.

Court: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other "wonder why he didn't testify." I tell you that jurors are only human beings and that there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

Court: You are? And you are willing to take that risk by not testifying? Don't misunderstand me, son. I don't mean to be threatening you in any way. I am trying to get some information which is my job to elicit. What I want to do is be sure that you are satisfied with not testifying.

Court Reporter: I didn't get his answer.

Court: I understood him to say yes, sir. I want you to tell

> me, son, have you talked to your lawyer about the fact that no matter what you say to the jury about what the law is, I cannot erase from their minds the natural tendency of any human being to wonder or wonder why the defendant didn't testify. What I am telling you is that you run some risk by not testifying. Are you aware of that risk?
>
> Mr. Butler: Yes, sir.

(Tr. p. 871, l. 15 - p. 873, l. 19). (App. pp. 41-44). The trial court continued to make inquiry of Butler after a recess where Butler consulted with his attorney. In the extended inquiry in which he tried to explain the risk he may take by not testifying, Horace Butler consistently maintained that he did not want to testify. (Tr. pp. 875-877). After the inquiry was over, the defense rested without Mr. Butler testifying. The trial judge, during his jury instruction, then stated the following:

> Mr. Foreman, ladies, and gentlemen, the constitution of our state provides that any person

> who is brought to trial on charges in this court may avail himself of his constitutional right to trial by jury and elect not to testify in that case himself. I tell you that any person who elects to exercise that constitutional right not to testify is entitled to not have that fact considered by the jury which listens and makes the decision as to his guilt or (innocence). I am instructing you that you would not in any way consider in your deliberations the fact that this defendant has not testified. You will not even mention it when you go back to your jury room. Put it from your mind and it makes no difference anyhow because, as I have charged you, the state has the responsibility of proving the material elements of the crime of murder.

(Tr. p. 945, l. 16 - p. 946, l. 4). The jury subsequently convicted Butler of murder. A sentencing proceeding was held in which Butler continued to not testify. During the argument, however, Butler chose to make an unsworn argument pursuant to South Carolina law to the jury as to why the death penalty was not appropriate.

(Tr. p. 1015). Sections 16-3-20(B), 16-3-28, CODE OF LAWS OF SOUTH CAROLINA (1976).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

In his recent habeas corpus proceedings, Butler sought to challenge his conviction for the first time because the trial judge's comments violated his Fifth Amendment rights as determined by the State Supreme Court's prior decisions in Gunter, supra; Pierce, supra; and Cooper, supra. Further, he asserted that those cases created an irrebuttable presumption of prejudice in violation of a criminal defendant's Fifth Amendment right not to be compelled in a criminal case to be a witness against himself when a trial judge comments to a criminal defendant how a jury may or may not view a defendant's decision not to testify, citing Pierce, 346 S.E.2d at 710. In Pierce, the Supreme Court of South Carolina stated:

> Although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error.

Pierce, 346 S.E.2d at 710. He further relied upon State v. Gunter, supra, in which the Supreme Court of South Carolina held "it is a violation of a defendant's Fifth Amendment rights for a judge to make comments on how a jury may or may not view a defendant's decision not to testify." Pierce, 346 S.E.2d at 710, citing Gunter.

In granting the petition for the writ, the Supreme Court of South Carolina concluded that the habeas request "is based on the fact that at his trial, the same trial judge [as in Gunter, Pierce, and Cooper] committed this identical error. If anything, the error here was

more egregious since it was subsequently determined that petitioner is mentally retarded ...." The Supreme Court of South Carolina, finding that "petitioner seeks to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post conviction relief proceedings," granted habeas relief on this "grave constitutional error under the unique and compelling circumstances of this case." (Appendix A, pp. 38-39).

REASONS WHY THE WRIT SHOULD BE GRANTED

The Fifth Amendment to the United States Constituiton provides in part that: "No person ... shall be compelled in any criminal case to be a witness against himself ...." In United States v. Washington, 431 U.S. 181, 187 (1977), this Court recognized that "absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated ...."

In conflict with the decisions of this Court, other state courts and federal courts of appeal, the Supreme Court of South Carolina has erroneously interpreted the Fifth Amendment to preclude judicial comment to a criminal defendant of a risk that a jury may wonder why a defendant did not testify when determining whether he understood his right to testify or not testify. The lower court has further struck new ground by placing this alleged "grave constitutional error" with a presumption of prejudice where an appropriate standard under this Court's precedent for similar constitutional violations should be subject to a harmless error analysis. The lower court's decision shakes the foundation of both the Fifth and Sixth Amendments because it fails to recognize that "whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."

Brooks v. Tennessee, 406 U.S. 605, 512 (1972). Certiorari should be granted to ensure that the focus of the Fifth Amendment right not to be compelled to be a witness against himself is on whether the defendant was officially compelled to be a witness. Further, this Court should establish that Fifth Amendment violations are subject to an appropriate harmless error analysis, particularly where such comment did not change a defendant's tactical decision.

1. The decision of the Supreme Court of South Carolina conflicts with the decisions of this Court and other state and federal courts.

In Carter v. Kentucky, 450 U.S. 288, 302, n. 18 (1981), the United States Supreme Court recognized that "it has been universally thought that juries notice a defendant's failure to testify" and that "the layman's natural first suggestion

would probably be that the resort to privilege is a clear confession of crime." Importantly, in Carter, the court stated the following principle:

> A trial judge has a powerful tool at his disposal to protect the constitutional privilege -- the jury instruction -- and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Carter, 450 U.S. at 303.

Here, the state trial judge properly gave a "no influence" instruction required by Carter. The perceived Fifth Amendment problem solely derives by the trial judge's comment to the defendant that there was a risk the jury might wonder why he did not testify. The state court characterized this judicial comment of a

fact recognized by this Court in Carter to be a Fifth Amendment violation and a "grave constitutional error." Clearly, we submit that such comment was no constitutional error.

The problem with the state court decision is that it refuses to acknowledge the principle set forth in Carter that "no judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation." Id. When the state trial judge made the comment that there was a risk the jury may speculate about why he did not testify, it is clear the judge was stating the principle "universally recognized." In light of the Court opinion in Carter, would it have been appropriate for the trial judge to tell a criminal defendant when he is making his decision on whether to testify that without any doubt the jury will not speculate about why he failed to testify?

Clearly, that comment would be factually wrong according to Carter. Here, the trial judge essentially told t'e defendant that by giving the no inference instruction he would reduce the risk of speculation to a minimum. Such comment was in accord with Carter and the Fifth Amendment, particularly when a defendant, through counsel, states he did not understand the advantages and disadvantages of not testifying.

Similarly, other state and federal courts have rejected uniformly the approach adopted by the State Supreme Court. In a case remarkably similar to the situation at hand, the Court of Special Appeals of Maryland has held that a trial judge's explanation of a defendant's right to testify in which he acknowledged that the juror might infer from defendant's failure to testify that he was guilty, did not constitute reversible error. Wooten-Bey

v. State, 547 A.2d 1086, (Md. App. 1988) aff'd. 568 A.2d 16 (Md. 1990). In Wooten-Bey, the trial judge stated to the defendant:

> The Court ... let me see if I can address it to you in layman's terms. If you choose not to take the witness stand, part and parcel of what goes along with that is the possible disadvantage that someone on that jury panel is going to say, look, this guy is obviously guilty, because guilty people hide. And innocent people are willing to talk. That could happen and all the judges' instructions in America cannot overcome a person who is of contrary mind, if you know what I mean. I sit there and say you can't do this, and they say, the hell I can't. So if you don't testify, obviously one of the disadvantages that could go along with not testifying, it doesn't mean it will. If they listen to my instructions to a fare thee well and most jurors do. It is my experience that they follow judges' instructions right down the line. Then that adverse part would not play a part. I cannot tell you, you are saying to me, but what is this business about Harvey getting to cross-examine me? Well, if you do take the witness stand, Harvey, Mr. Harvey will have the right to cross-examine you. You may choose not to. Although honesty impels me to say, I can't conceive of that. Ibid. at 1093.

In Wooten-Bey, the defendant did take the stand (unlike the instant situation in Butler) and testify and the Court of Appeals found that the issue before them was "whether appellant was misled and induced by the trial judge's explanation into taking the stand, thus risking the juror's exposure to his prior criminal record." The court then found that the defendant, from statements contained in the trial record, had made the decision to testify "long before the trial judge made these allegedly erroneous comments" and that therefore, in light of the fact that the trial judge covered the basics, on defendant's right not to testify and his remarks, the trial judge did not err. The trial judge's comments were not found to be error in spite of the fact that the defendant there did testify, while in the instant case, Horace Butler did not testify just as he asserted he had chosen not

to testify prior to Judge Harris' allegedly offensive remarks. Just as the court in Wooten-Bey pointed out, if the remarks of the trial judge do not sway the defendant to a change of position, although his statements may be inappropriate, no reversible error has been committed.

In the case of United States v. Goodwin, 770 F.2d 631 at 637 (2nd Cir. 1985), the Court of Appeals found comments by a trial judge that may have coerced the defendant to testify allegedly in violation of the Fifth Amendment were a constitutional violation but that the violation was harmless beyond a reasonable doubt. In Goodwin, the defendant upon questioning by the trial judge as to whether she had decided not to testify responded "I don't know what would be best. Most of the things that have been brought out I just don't know. I feel that would probably be best." 770 F.2d at 636. The

defendant affirmed that she understood her rights both to testify and not to testify and asked to speak with her sons for a few minutes. The judge's comments therein included language as to whether the jury would be desirous of hearing her position of innocence, that he was surprised by her decision about testifying and his impression was that she was going to maintain her innocence and take the position that the government witnesses were lying. The defendant later decided to testify, against the advice of her attorney. The Court of Appeals found that while they were certain the defendant took the judge's comments into consideration in making her decision, her will was not overborne.

> Furthermore, even if the judge's comments did compel Goodwin to testify, in violation of the Fifth Amendment, we believe that the constitutional error was harmless beyond a reasonable doubt. Ibid at 637.

Again, as in Wooten-Bey, the effect of the judge's comments, whether or not they were actually coercive in nature, resulted in the defendant's decision to testify, whereas in the instant case, Horace Butler steadfastly held firm to his original decision, concurring in the advice of his attorney, not to testify concerning the facts and circumstances of his case in front of the jury.

In a related case, People v. Phillips, 542 N.E.2d 814 (Ill. App. 1989), the appellate court of Illinois held that a trial judge's requirement that the defendant had to testify immediately after the close of the state's case, if he were to testify at all, though erroneous was harmless error since the defendant had already made his decision not to testify prior to the trial as part of his defense strategy with his attorneys concurrence and therefore "there was no prejudice to

the defendant as a result of this error." 542 N.E.2d at 819. Although the facts of the case are different, the situation and result are the same as in this case where Butler had earlier made his decision not to testify as part of the defense strategy prior to the questioning by the judge and stuck to that decision.

2. The presumption of prejudice standard adopted by the State Supreme Court is not the appropriate standard for a Fifth Amendment violation when a defendant does not testify.

Here, the state court concluded that the mere statement by a trial judge to a defendant that the jury may speculate why he did not testify was reversible constitutional error even though such comments did not compel Butler to testify. In doing so, it rejected a request for harmless error analysis under Chapman v. California, 386 U.S. 18 (1967), by apply-

ing a presumption of prejudice standard it had earlier adopted in State v. Pierce, 289 S.C. 430, 346 S.E.2d 707, 710 (1986). This approach is in conflict with the decisions of this Court and other federal circuit courts.

In Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978), adhering to 549 F.2d 971 (5th Cir. 1977), the Fifth Circuit applied the Chapman harmless error standard to a question as to whether a defendant was deprived of a constitutional right to testify. More recently in U.S. v. Teague, 908 F.2d 752 (11th Cir. 1990), the Eleventh Circuit applied a Chapman harmless error analysis to whether Teague made a knowing, voluntary, and intelligent waiver of his right to testify. Similarly, in Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990), the court rejected a presumption of prejudice standard while also concluding the petitioner was not denied

his right to testify by trial counsel's advice. Similarly, such a standard was again rejected in U.S. v. Curtis, 742 F.2d 1070, 1075-76 (7th Cir. 1984), when that court held that when a defendant persisted in a desire to testify, but planned to offer perjured testimony, a defendant's right to testify was not violated when the attorney failed to allow him to take the witness stand. We have previously noted the application of the Chapman test to situations in Wooten-Bey, supra; U.S. v. Goodwin, supra, and People v. Phillips, supra. Also U.S. v. Arthur, 602 F.2d 660, 664 (4th Cir. 1979) (application of Chapman standard appropriate where interrogation of advice about right not to testify took place out of jury's presence and had no effect on the outcome of the trial).

The harmless error standard of Chapman, under which a reviewing court should not set aside an otherwise valid convic-

tion if the court may confidently say, on the whole record, that the constitutional error in question was harmless beyond a reasonable doubt, should apply to judicial comments about the effect a jury may give to a failure to testify which do not induce a defendant to testify. Here, it was the developed strategy that Butler would not testify which Butler has acknowledged both at trial and in state post conviction relief proceedings. Where the prejudicial comments do not "compel" a defendant to take the witness stand, clearly there has been no constitutional violation of his Fifth Amendment right mandating a new trial. Since Chapman, this Court has repeatedly applied that standard to a variety of constitutional errors of similar magnitude. E.g., Rose v. Clark, 478 U.S. 570 (1986) (erroneous malice instruction); Delaware v. Arsdall, 475 U.S. 673 (1986) (failure to permit

cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114, 118 (1983) (per curiam) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499, 508-509 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment). It is only when constitutional errors either aborted the trial process, as in Payne v. Arkansas, 356 U.S. 560 (1958) (use of a coerced confession), or denied it altogether, as in Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927)

(adjudication by a biased judge), that the Court has concluded such errors could never be harmless. While there are some errors to which the harmless error standard does not apply, this is the exception rather than the rule. Rose v. Clark, supra, 478 U.S. at 578. Here, certiorari is appropriate to resolve its applicability to judicial comments which neither compel testimony from a defendant nor misstate universal facts recognized by this Court.

The State of South Carolina submits that the granting of certiorari would ensure that the purpose of the Self-Incrimination Clause is maintained. That purpose, we submit, is to "determine whether the petitioner has been 'compelled ... to be a witness against himself.' Compulsion is the focus of the inquiry." Carter, supra, 450 U.S. 306 (Powell, J., concurring). As Justice Powell clearly

stated: "A defendant who chooses not to testify hardly can claim that he was compelled to testify." Id. at 306. The Supreme Court of South Carolina's determination to the contrary demands reconsideration upon certiorari by this Court.

CONCLUSION

For all reasons set forth within the petition, we respectfully request this Court to grant our petition for certiorari.

Respectfully submitted,

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September 18, 1990
Columbia, South Carolina

APPENDIX A

THE SUPREME COURT OF SOUTH CAROLINA

Horace Butler, Petitioner,

v.

The State of South Carolina, Respondent.

ORDER

Petitioner, a death row inmate, seeks a writ of habeas corpus. After careful consideration of the important issues raised by his petition, and in light of the unique circumstances involved in this matter, we grant the writ.

Petitioner's conviction and sentence were affirmed on direct appeal. State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982), cert. denied, 459 U.S. 932 (1983). Three years later we affirmed the denial of petitioner's request for post conviction relief. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474

U.S. 1094 (1986). Petitioner has now exhausted his federal reviews.

Three and one-half years after petitioner's direct appeal was affirmed, and approximately one and a half months after the decision in Butler v. State, this Court issued its opinion in State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). In Gunter we held the trial judge violated the defendant's fifth amendment rights by coercing him to take the witness stand in his defense. We deplored the judge's warning that even though he would charge the jury they could not consider the defendant's failure to testify, the jury would most likely ignore this instruction.

Subsequently, two capital cases raising this issue came before us. In State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), and State v. Cooper, 291 S.C.

332, 353 S.E.2d 441 (1986), the same trial judge made similar comments to each defendant. Both defendants had chosen not to testify, and neither was swayed by the judge's comments. The State argued, therefore, that any error was harmless since the defendants were not prejudiced. We rejected the suggestion that these types of comments could ever constitute harmless error, noting, "The comments by the judge were erroneous, improper and contrary to South Carolina law." State v. Pierce, 289 S.C. at 434, 346 S.E.2d at 710.

Petitioner's request for habeas corpus is based on the fact that at his trial, this same trial judge committed this identical error. If anything, the error here was more egregious since it was subsequently determined that petitioner is

mentally retarded.[1] A review of the colloquy in light of this fact (unknown to the trial judge at the time) raises serious questions whether petitioner even understood the proceedings. Cf., State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988) (valid waiver not established by mentally retarded defendant's bare assent to leading questions).

"The great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." Walker v. Wainwright, 390 U.S. 335, 88 S.Ct. 962, 19 L.Ed.2d 1215 (1968). Here, petitioner seeks to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of

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[1]Some evidence of petitioner's retardation was produced at the sentencing phase of his trial; the judge's comments were made during the guilt phase. The most recent testing indicates petitioner has a Full Scale I.Q. of 61, a Verbal I.Q. of 65, and a Performance I.Q. of 61.

state post conviction relief proceedings. We caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." State v. Miller, 16 N.J.Super. 251, 84 A.2d 459 (1951) (emphasis added); see also Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948). Although we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief.

Accordingly, the writ of habeas corpus is granted. The matter is remanded

to the Charleston County Court of General Sessions for a new trial.

IT IS SO ORDERED.

s/ George T. Gregory, Jr., C.J.

s/ David W. Harwell, A.J.

s/ A. Lee Chandler, A.J.

s/ Ernest A. Finney, A.J.

s/ Jean H. Toal, A.J.

Columbia, South Carolina

June 20, 1990

APPENDIX B

THE COURT OF GENERAL SESSIONS

FOR CHARLESTON COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

v.

HORACE BUTLER

EXCERPTS FROM TRIAL

[871]

(Jury retires to the jury room.)

COURT: Mr. Butler, I want you to stand up, please. Your lawyer tells me, as you just heard him say, he does not intend for you to testify in this case. You understand that?

MR. BUTLER: Yes, sir.

COURT: Do you agree with your lawyer's strategy in not [872] testifying?

MR. BUTLER: Yes, sir.

COURT: You know that the Constitution of the United States and of South Carolina both gives to anyone who is charged with a crime, any crime, the right to be tried by a jury which you have quite properly elected to do, avail yourself of, and to stand that trial without having to get on the witness stand and testify if that defendant doesn't want to do so. You understand that right?

MR. BUTLER: Yes, sir.

COURT: By the same token, you have every right to testify and to tell your side of it, to tell any circumstances which you think would help you. You understand that?

MR. BUTLER: Yes, sir.

COURT: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not testi-

COURT: You know that the Constitution of the United States and of South Carolina both gives to anyone who is charged with a crime, any crime, the right to be tried by a jury which you have quite properly elected to do, avail yourself of, and to stand that trial without having to get on the witness stand and testify if that defendant doesn't want to do so. You understand that right?

MR. BUTLER: Yes, sir.

COURT: By the same token, you have every right to testify and to tell your side of it, to tell any circumstances which you think would help you. You understand that?

MR. BUTLER: Yes, sir.

COURT: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not testi-

fying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

MR. HILL: He doesn't understand, Your Honor.

COURT: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other [873] "wonder why he didn't testify." I tell you that jurors are only human beings and that there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

COURT: You are? And you are willing to take that risk by not testifying? Don't

lying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

MR. HILL: He doesn't understand, Your Honor.

COURT: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other [sic] "Wonder why he didn't testify." I tell you that jurors are only human beings and that there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

COURT: You are? And you are willing to take that risk by not testifying? Don't

misunderstand me, son. I don't mean to be threatening you in any way. I am trying to get some information which is my job to elicit. What I want to do is be sure that you are satisfied with not testifying.

COURT REPORTER: I didn't get his answer.

COURT: I understood him to say yes, sir. I want you to tell me, son, have you talked to your lawyer about the fact that no matter what you say to the jury about what the law is, I cannot erase from their minds the natural tendency of any human being to wonder or wonder why the defendant didn't testify. What I am telling you is that you run some risk by not testifying. Are you aware of that risk?

MR. BUTLER: Yes, sir.

COURT: And you are willing to take that risk in order to avoid going on the wit-

misunderstand me, son. I don't mean to be threatening you in any way. I am trying to get some information which is my job to elicit. What I want to do is be sure that you are satisfied with not testifying.

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MR. BUTLER: Yes, sir.

COURT: And you are willing to take that risk in order to avoid going on the wit-

ness stand and being cross examined by the solicitor, is that right?

MR. BUTLER: I can't answer that.

COURT: Sir?

MR. HILL: He said he couldn't answer that.

[874] COURT: Well, you are going to have to answer that before we proceed with the trial. I want to know and be sure that he has been thoroughly apprised of what is about to transpire here and he personally agrees with that course of conduct. All right, let's start over again. During lunch time you and your lawyer talked about this case, didn't you, son?

MR. BUTLER: Yes, sir.

COURT: And he talked about you not testifying, did he? Tell me what you all talked about at lunch. Wasn't it about your case? Mr. Hill, I am going to ask you to take your client somewhere private-

been stand and being cross examined by the solicitor, is that right?

MR. BUTLER: I can't answer that.

COURT: Sir?

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MR. BUTLER: Yes, sir.

COURT: And he talked about you not testifying, did he? Tell me what you all talked about at lunch. Wasn't it about your case? Mr. Hill, I am going to ask you to take your client somewhere private-

ly and talk to him so that he can properly answer my questions.

MR. HILL: All right.

COURT: I am sure you have already done so. I am not suggesting that you haven't. Advise him of what I am trying to do. I am not trying to get him to change his mind or do anything, but I am not going to waste three days of my time and yours and these jurors by having him say I don't know. I can't make up mind or not. He is going to have to tell me something before we proceed with the trial.

MR. HILL: He wants to go in the room with me, Your Honor.

COURT: Certainly. that is what I meant. But you understand what I mean, Mr. Hill.

MR. HILL: Yes, sir.

ly and talk to him so that he can properly answer my questions.

MR. HILL: All right.

COURT: I am sure you have already done so. I am not suggesting that you haven't. Advise him of what I am trying to do. I am not trying to get him to change his mind or do anything, but I am not going to waste three days of my time and yours and these jurors by having him say I don't know. I can't make up mind or not. He is going to have to tell me something before we proceed with the trial.

MR. HILL: He wants to go in the room with me, Your Honor.

COURT: Certainly. That is what I meant. But you understand what I mean, Mr. Hill.

MR. HILL: Yes, sir.

COURT: I want him to tell me that he has discussed it [875] with you and he agrees not to testify.

(Mr. Hill and Mr. Butler leave the courtroom.)

(Mr. Hill and Mr. Butler return to the courtroom.)

COURT: Mr. Butler, let me talk with you further, if you will. While ago you heard the lawyer say that is the defendant's case. You heard him say that. That means that you are not going to testify. You understand that?

MR. BUTLER: Yes, sir.

COURT: Means you are not going to come around here and sit down there and tell that jury your side of this controversy. You are not going to get a chance to say "I didn't do it; I wasn't around there" or say anything like that. Do you understand that? You have talked to your lawyer

COURT: I want him to tell me that he has discussed it [87?] with you and he agrees not to testify.

(Mr. Hill and Mr. Butler leave the courtroom.)

(Mr. Hill and Mr. Butler return to the courtroom.)

COURT: Mr. Butler, let me talk with you further, if you will. While ago you heard the lawyer say that is the defendant's case. You heard him say that. That means that you are not going to testify. You understand that?

MR. BUTLER: Yes, sir.

COURT: Means you are not going to come around here and sit down there and tell that jury your side of this controversy. You are not going to get a chance to say "I didn't do it; I wasn't around there" or say anything like that. Do you understand that? You have talked to your lawyer

about that procedure, didn't you, about you not testifying?

MR. BUTLER: Yes.

COURT: Before he told me that is the defendant's case, you all had already talked about that, right?

MR. BUTLER: Yes, sir.

COURT: Now, do you agree with your lawyer that you ought not to testify in this case?

MR. BUTLER: Yes, sir.

COURT: Do you know that, as I just finished telling you, there is a serious risk involved in that procedure because human beings are naturally going to wonder why he didn't testify. Are you aware of that?

[876]

MR. BUTLER: Yes, sir. I ain't guilty.

COURT: I am not arguing with you about that, son. It is just like, for instance,

about that procedure, didn't you, about you not testifying?

MR. BUTLER: Yes.

COURT: Before he told me that is the defendant's case, you all had already talked about that, right?

MR. BUTLER: Yes, sir.

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[876]

MR. BUTLER: Yes, sir. I ain't guilty.

COURT: I am not arguing with you about that, son. It is just like, for instance,

if a couple of fellows stand around and one of them accuses the other one of doing something and that one never says a word, makes you wonder, doesn't it, wonder why he didn't deny that he did it. That fellow accused him of doing it and he wouldn't deny it. It would raise a question in your mind, wouldn't it?

MR. BUTLER: Say that over again.

COURT: Suppose you and I are out here, not in court, anywhere else, but I walk up to you and say, "Dad gum it, Horace, you stole my wallet," and you don't say a word. I say, "Dad gum it, I say you stole my wallet," and you don't say a word. A fellow standing over here and listening to us is going to think you stole my wallet, isn't he, because he will think if Horace didn't do it, he is going to say I didn't do it. See what I mean?

MR. BUTLER: Yes, sir.

COURT: All right. That risk is what you are taking with this jury, even though I tell them they can't do that. They might do it anyhow and I have got no way of controlling them, once they go in the jury room. Do you understand?

MR. BUTLER: Yes, sir.

COURT: And are you now being advised of that risk, satisfied with the position which your lawyer and you have agreed [877] on not to testify in this case?

MR. BUTLER: Yes, sir.

COURT: All right. Thank you. Be seated.

No. 90-498

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF SOUTH CAROLINA,

Petitioner,

v

HORACE BUTLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE ISSUES PRESENTED

I.

Does the South Carolina Supreme Court's decision to grant extraordinary relief based on what the state court found to be the "unique and compelling facts" of respondent's case warrant intervention by this Court?

II.

Does South Carolina's application of its own prophylactic rule of reversal in this case present a substantial federal question?

III.

Does the South Carolina Supreme Court's refusal to disregard as harmless a trial judge's coercive statements to a confused and mentally retarded capital defendant present an issue worthy of review by certiorari?

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No. 90-498

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BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S STATEMENT OF THE CASE

I. Relevant Procedural History.

Respondent Horace Butler filed a petition for writ of habeas corpus challenging his convictions and sentence of death in the original jurisdiction of the South Carolina Supreme Court on May 9, 1990, pursuant to S.C. Const. art. V, §5 (1976), and S.C. Code §14-3-310 (1976).[1] His petition was based upon the fact that the record of his trial revealed an error identical to one which later led the South Carolina Supreme Court to reverse the convictions and death sentences imposed in State v. Pierce, 289 S.C. 430, 346

[1]Respondent's petition for writ of habeas corpus, the state's response and respondent's reply are attached as appendices to this brief.

S.E.2d 707, 710 (1986), and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441, 443 (1986). See also State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985) (non-capital conviction reversed due to same error by same judge). As will be set forth in more detail below, the error involved comments by the trial judge, the Honorable C. Anthony Harris, as to how the jury would likely view respondent's decision not to testify.

The South Carolina Supreme Court agreed that Judge Harris committed the "identical error" in respondent's case as in the South Carolina precedents cited, and noted that, "if anything, the error [in respondent's case] was more egregious" than in Pierce, Cooper and Gunter since respondent is mentally retarded, and because "[a] review of the colloquy in light of this fact (unknown to the trial judge at the time) raises serious questions whether petitioner even understood the proceedings." Order at 2; App. to Pet. for Cert. at 38. Accordingly, the state supreme court granted the writ of habeas corpus and ordered a new trial on the basis of the "unique and compelling circumstances" of respondent's case. Order at 3; App. to Pet. for Cert. at 39. With this action, respondent's case became the only capital case since Furman v. Georgia, 408 U.S. 238 (1972), in which the South Carolina Supreme Court has granted a petition for writ of habeas corpus in its original jurisdiction. Respondent also appears to be the only capital defendant ever to obtain relief by means of a successive collateral attack on a conviction or death sentence in the courts of South Carolina.

II. The Decision of the South Carolina Supreme Court.

A. Facts relevant to the claim upon which the state court granted habeas relief.

Respondent was tried for the murder of Pamela Lane. When his trial counsel announced that the defense intended to rest without calling respondent to testify on his own behalf, the trial judge initiated a lengthy monologue in which he warned respondent no fewer than seven separate times that the jury would likely hold his failure to testify against him, regardless of the instructions of the court. App. to Pet. for Cert. at 41-50; Transcript of Record, State v. Horace Butler (hereinafter cited as "Tr.") at 871-877. Throughout most of this discussion, respondent was obviously confused and bewildered: other than "Yes, sir," all of his responses were to the effect that he did not understand, Tr. 872, line 21, Tr. 873, lines 11-12, that he could not answer, Tr. 873, lines 23-25, that he wanted to go into a room to talk to his lawyer, Tr. 874, lines 21-24, and that he wanted the judge to repeat his questions. Tr. 876, line 9. The record before the South Carolina Supreme Court (though not before the trial judge or jury) revealed that Horace Butler is mentally retarded, with a full-scale I.Q. of 61. Butler v. State of South Carolina, Order at 2; App. to Pet. for Cert. at 38 n.1.

Respondent ultimately did not testify in the guilt-or-innocence phase of the trial. However, he subsequently gave up his right to remain silent by making a very brief unsworn statement to the jury at his sentencing hearing, which he began by blurting out, "This crime which I did, I didn't do it." Tr. 1015. Prior to this

statement, the trial judge advised respondent of his right to testify or not, and of his right to make a closing statement. However, the judge did not advise him of his right to decline to make any statement at all. In addition, the judge neither retracted nor modified his earlier admonitions about the peril in which respondent would place himself if he failed personally to tell the jury his side of the story. Tr. 994, line 10.

In late 1985, after respondent had exhausted his then-available state remedies, the South Carolina Supreme Court held for the first time that a substantially identical series of statements made to a criminal defendant by the same trial judge who presided over respondent's case constituted reversible error. State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). The core of the state court's holding is as follows:

> How a jury may or may not view a defendant's decision not to testify is not an appropriate subject for comment by the court. A statement by the trial judge which intimates that the jury will ignore his instructions is improper. As stated in Carter [v. Kentucky], supra, 450 U.S. at 301, 101 S.Ct. at 1120, "we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court. . ."
>
> In the present case, this court is of the opinion that the comments of the trial judge constitute reversible error because he exceeded the scope of his authority to instruct the appellant as to his Fifth Amendment rights.

286 S.C. at 560, 335 S.E.2d at 543.

In State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986),

decided the next year, the South Carolina Supreme Court again held that Judge Harris had committed reversible error when he advised the defendant as follows:

> I tell you that the jury will hold it against you, the fact that you did not testify . . . . I am going to charge them that the law does not permit them to hold it against you, but they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but wonder why he did not tell us his side of it.

289 S.C. at 434, 346 S.E.2d at 710. The court characterized these comments as "erroneous, improper and contrary to South Carolina law." 289 S.C. at 434, 346 S.E.2d at 710. The court also rejected the state's claim that these potentially coercive statements should be disregarded as harmless because the defendant ultimately did not testify:

> Although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error.

Id. Four months later, confronted with a virtually identical fact situation in another capital case tried by Judge Harris, the state court handed down a decision reaffirming its prior holdings in Gunter and Pierce. State v. Cooper, 291 S.C. 332, 336-37, 353 S.E. 2d 441, 443 (1986). In Cooper, as in Pierce, the defendant did not testify in the guilt phase of the trial after hearing Judge Harris's coercive statements, but did make a statement to the jury at the sentencing phase of the trial. The Cooper court reaffirmed

its refusal to disregard the comments as harmless under these circumstances and reversed.

In respondent's case, the South Carolina Supreme Court simply acknowledged that Judge Harris' comments violated the principles established in Gunter, Pierce and Cooper. Finding that the error in respondent's case was, if anything, more egregious than the violations in the previous cases, and in view of the "unique and compelling circumstances" of respondent's case, the state court granted the petition for writ of habeas corpus.

B. The "unique and compelling circumstances of this case" which impelled the South Carolina Supreme Court to grant relief.[2]

As noted above, the South Carolina Supreme Court described its decision to grant habeas relief as based on the unique and compelling circumstances of [Horace Butler's] case." Order at 3; App. to Pet. for Cert. at 39. The circumstances to which the state supreme court referred may be summarized as follows.

Respondent was convicted of murder and sentenced to death for the July 17, 1980, murder of Pamela Lane. After his arrest for an unrelated charge (later dismissed), respondent retained a local attorney, W. McAlister Hill, to represent him. Charleston County police waited until minutes after Mr. Hill left the jail before beginning an all-night interrogation which eventually produced an

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[2]This evidence was presented to the South Carolina Supreme Court by means of both the petition for writ of habeas corpus and an application for post-conviction relief which was filed in the trial court and provided to the state supreme court. Copies of both the state habeas and post-conviction relief papers are included in the appendix to this petition for this Court's convenience.

incriminating statement. In accordance with a standing order from the prosecutor's office, the police tape-recorded neither the statement nor the interrogation which produced it. After respondent made his incriminating statement, Charleston authorities charged him with Ms. Lane's murder.

Mr. Hill served as respondent's counsel in connection with the murder charge. This was Mr. Hill's first murder trial and he had limited felony experience.[3] No other attorneys assisted or participated in Hill's representation of respondent. The state originally placed the case on the trial roster for the first week of December of 1980 as a non-capital offense. However, the state declined to call the case when it was scheduled, and instead filed a notice of intent to seek the death penalty. The state then rescheduled respondent's case for January of 1981, and called it for trial on January 19 before the Honorable C. Anthony Harris and a jury.

In support of its demand for the death penalty, the state relied upon the statutory aggravating circumstances of kidnapping and rape. Immediately prior to trial, however, the state moved that the charges of kidnapping and rape be taken off the active trial roster until the disposition of the murder charge. This

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[3]Mr. Hill was admitted to the bar in 1974. He testified at the original post-conviction relief hearing that he had been involved in seven or eight felony cases prior to representing Mr. Butler, only two of which went to trial. Thus he would not have qualified for appointment in South Carolina as Mr. Butler's lead counsel pursuant to the criteria set forth in S.C. Code §16-3-26(B). See also State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988).

sequence of events suggests that the state recognized that its evidence regarding kidnapping and rape was weak, and thus decided not to expose those charges to the jury at the guilt-or-innocence phase of respondent's trial.

The state's evidence consisted largely of the testimony of Larry White,[4] and of respondent's own statements. White was charged as an accessory after the fact of murder. He testified at trial that he had been promised nothing in exchange for his testimony. However, the charges against him were later dismissed.

Despite respondent's uncounseled and unrecorded confession (in which he admitted shooting Lane after what he claimed to have been consensual sexual relations), the state's physical evidence was in some respects problematic. First, while the state maintained that respondent perpetrated this crime alone, an FBI hair identification expert testified that a Negroid pubic hair found on the victim's clothes "absolutely" did not come from respondent. The witness could not, however, exclude Larry White as a source of the pubic

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[4]Larry White testified that respondent Butler came and picked him up at a lounge called "the Whiz" in the Adams Run section late in the evening on July 17th. According to White, respondent told him that he needed White to help him do something. White left with respondent in respondent's car. White maintained that respondent took him to the victim's moped and asked him to help him dispose of it. White helped respondent push the moped in the marsh. White testified that it was only after the moped had been disposed of did he learn from respondent that Pamela Lane was dead. White also testified that respondent told him he had accidentally hit Ms. Lane while driving down the road. He stopped, and after he determined that she was probably not going to survive, he shot her.

It is important to note that respondent would not have needed White's help to dispose of the moped. Ms. Lane's sister testified that she could easily lift the moped by herself. In fact, she had loaded it into her car by herself and brought it to Pamela on July 17th.

hair.[5] Second, the state failed to carry out a simple blood factor test on the victim to prove or disprove the prosecution's theory that blood factors found in her vagina came from her and not from a third person.[6] Third, the pathologist testified that the autopsy did not reveal any evidence of forcible sexual relations. While he maintained that this was not absolutely inconsistent with rape, he did state that in his experience there were usually signs of vaginal tearing or abrasions in cases involving forced sexual activity.[7] Fourth, the victim's brand-new moped bore paint scrapings which were inconsistent with the paint on respondent's automobile.

Respondent was convicted of Ms. Lane's murder on January 24, 1981. At the conclusion of the guilt-or-innocence phase of the trial, Judge Harris determined that the state did not have sufficient evidence to submit the statutory aggravating

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[5]Additionally, evidence presented at the original post-conviction relief hearing revealed that Larry White, not Horace Butler, was known to carry a .22 caliber pistol, which was the type of weapon used in the murder of Pamela Lane. Furthermore, Ms. Lane's shoes were found near a bar called "the Whiz." Larry White worked at "the Whiz."

[6]Semen found in the victim's vagina was found to contain Type A blood factors. Respondent has Type O blood and is a non-secretor, which means that he does not secrete his blood factors into bodily fluids such as semen. The victim had Type A blood. Thus the state postulated that the Type A blood factor in the semen came from Ms. Lane's own vaginal secretions. However, for unknown reasons, the state's investigators did not test Ms. Lane's remains to determine whether she was a secretor. If she was not a secretor, the semen found in the victim's body would have had to have come from a male with Type A blood, and thus could not have come from respondent.

[7]He stated: There was "no evidence of trauma normally found in forced sexual intercourse."

circumstance of kidnapping to the jury. Tr. 972. Judge Harris also stated that he was extremely skeptical as to the sufficiency of the evidence of rape. Id. However, after deliberating overnight, he ultimately determined that he would allow the rape aggravating circumstance to be submitted to the jury.

The state presented no additional evidence in aggravation of punishment during its sentencing phase case-in-chief. The mitigation case presented by Mr. Hill lasted approximately 10 minutes, and consisted of a stipulation that the victim had attempted suicide on two occasions, and the testimony of a school principal that respondent dropped out of school at age 16 in the fourth grade. As was presented in detail to the South Carolina Supreme Court in these habeas corpus proceedings, the jury was not apprised that:

> * respondent is mentally retarded with a full-scale I.Q. of 61, and a mental age of less than a nine-year-old child;
>
> * he is brain-damaged and mentally ill; and,
>
> * he was raised in conditions of abject poverty, deprivation, and profound social isolation.

See Application for Post-Conviction Relief at 24-44; D-1.[8] Essentially, the jury's sentencing decision was made without benefit of any substantial information about the person whose life rested in their hands.

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[8]After being apprised of the results of psychological and neuropsychological testing conducted after petitioner's trial, the South Carolina Supreme Court concluded, "A review of the colloquy in light of [respondent's mental condition] raises serious questions whether petitioner even understood the proceedings." Order at 2; App. to Pet. for Cert. at 38.

The jury deliberated for approximately three hours before returning with a verdict of death. After accepting the sentence of death, the trial judge made the following comment to the jury:

> Your responsibility to the state and to the defendant is concluded when you arrive at a verdict. As I say, it is a proper one under the evidence. Another verdict would have been proper, depending upon your views of the facts and applying the law as I gave it to you.

Tr. 1037 (emphasis added). Thus, the trial judge's actions and comments throughout respondent's trial suggest that, even without the benefit of the wealth of mitigating information later presented to the South Carolina Supreme Court in this habeas proceeding, the judge personally believed this to be a case in which a life sentence would have been entirely appropriate.

REASONS THE WRIT SHOULD BE DENIED

I. This Case Presents No Substantial Federal Question, Because the Decision of the South Carolina Supreme Court Rested on an Adequate and Independent State Ground.

It is, of course, well settled that this Court will not consider an issue of federal law when reviewing a judgment of a state court if that judgment rests on an adequate and independent state law ground. See, e.g., Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038 (1989); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874). The independent and adequate state ground rule is a corollary of the fundamental principle that this Court lacks jurisdiction to review matters of state law. As the Court noted in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), the Supreme Court's inability to review

such state court judgments

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

A review of the decision in respondent's case and its progenitors reveals that the Supreme Court of South Carolina was doing nothing more than holding, as a matter of state criminal procedure, that a trial judge in a criminal case may not comment on how a jury will view a defendant's exercise of his Fifth Amendment right not to testify, and that if he does, a defendant is entitled to a new trial. Neither this state-created rule nor its application to the facts of this case presents a substantial federal question.

The starting point is State v. Gunter, supra. In Gunter, the South Carolina Supreme Court, in considering the appropriateness of Judge Harris' comments, concluded:

> State law mandates that, if a defendant fails to take the stand in his own defense and requests a charge to that effect, the trial judge must instruct the jury that his failure to testify cannot be held against him or considered by the jury in any manner during their deliberations. How a jury may or may not view a defendant's decision not to testify is not an appropriate subject for comment by the court. A statement by the trial judge which intimates that the jury will ignore his instructions is improper.

286 S.C. at 559, 335 S.E.2d at 543. The state law nature of the South Carolina Supreme Court's holding is further made apparent by its statements in Pierce, Cooper and respondent's case that Judge Harris' comments were "erroneous, improper and contrary to South Carolina law." See Pierce, 289 S.C. at 434, 346 S.E.2d at 710; Cooper, 291 S.C. at 336, 353 S.E.2d at 443; Butler, Order at 2; App. to Pet. for Cert. at 37.

What the South Carolina Supreme Court did in these four cases was develop and enforce a state prophylactic rule designed to insure the protection of a federal constitutional right. Cf. Delaware v. Van Arsdall, 475 U.S. 673, 678 n.3 (1986) (rejecting claim that state court's harmless-error determination rested on state law where opinion "nowhere suggests the existence of a state prophylactic rule designed to ensure protection for a federal constitutional right"). The Attorney General conceded as much in its pleading filed in the state court when it described the South Carolina Supreme Court's decisions as establishing an "apparent prophylactic rule." State's Return at 15, B-1.[9] This characterization is abundantly supported by South Carolina law.

Gunter, Cooper and Pierce make clear that the South Carolina Supreme Court has decided as a matter of state law that a trial judge should not comment on how a jury may or may not view a

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[9]Furthermore, despite petitioner's contentions in this Court that respondent asserted below that the trial judge's comments violated the Fifth Amendment, petitioner complained in the South Carolina Supreme Court that respondent had failed to identify the constitutional right alleged to have been violated. Return at 5, B-1.

defendant's decision not to testify. The state court further held, again as a matter of state law, that if the trial judge does so comment, it will not, under most circumstances, engage in a harmless-error analysis. "A State, of course, may apply a more stringent state harmless-error rule than Chapman [v. California, 386 U.S. 18 (1967),] would require." Connecticut v. Johnson, 460 U.S. 73, 91 (1983) (Powell, J., dissenting) (emphasis in original). That is just what the South Carolina Supreme Court did here. The state court's decision to preclude trial judges from making this type of comment regarding the protections of the Fifth Amendment, and to enforce this preclusion with a rule of reversal, does not present a federal question. Therefore this Court lacks jurisdiction to entertain the state's complaint concerning the decision of the South Carolina Supreme Court, and the petition for writ of certiorari should be denied.[10]

II. There are no Special and Important Reasons Warranting Certiorari in this Case.

Rule 10 of the Rules of this Court makes clear that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion," and "will be granted only when there are special and important reasons therefor." Id.[11] In addition to

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[10]The state law basis of the South Carolina Supreme Court's decision is underscored by the Attorney General of South Carolina's failure to petition this Court for a writ of certiorari following the decisions in Gunter, Pierce or Cooper.

[11]Rule 10 states in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are

the fact that there is no federal question involved in this case, and thus no jurisdictional basis for intervention by this Court, none of the reasons set forth in Rule 10 warrant certiorari in this case. Respondent's case involves no important or substantial question of "federal law which has not been, but should be, settled by this Court." Nor did the South Carolina Supreme Court decide on a federal question in a way that conflicts with applicable decisions of this Court.

The importance of the issues involved in the case as to which review is sought is of major significance in determining whether certiorari should issue. This Court, obviously, cannot give full consideration to all cases which present novel or interesting issues, and must necessarily confine itself to cases which reflect important legal problems within the realm of its jurisdiction. Furthermore, the problem, though intrinsically important, must be "beyond the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). While there is no formula which reveals the precise amount of importance that will move the Court

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special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

* * *

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

to grant certiorari, the existence of admittedly "serious legal questions" is not, in and of itself, sufficient. English v. Cunningham, 361 U.S. 905, 907 (1959). Furthermore, importance is a relative factor, dependent upon the type of issue involved, the way in which the claim was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case. See Stern, Gressman & Shapiro, Supreme Court Practice (6th Ed.) at 212-13.

Respondent's case involves only the idiosyncratic remarks of a single South Carolina state trial judge regarding how a jury might view a defendant's decision not to testify. It is the last in a series of four cases involving comments by this same judge. The South Carolina Supreme Court was well aware of this fact when it rendered its decision granting habeas relief in respondent's case. Thus the ruling of the South Carolina Supreme Court affects no one except Horace Butler, a mentally retarded death row inmate.

Furthermore, the decision of the South Carolina Supreme Court was based not only on the violation of the principles it had delineated in Gunter, Pierce and Cooper, but also on the totality of the circumstances of respondent's case, including the basic injustice of respondent's sentence of death. In the pleadings filed in the state courts, respondent set forth a number of reasons why his conviction and sentence of death violated principles of basic fairness. These included the tenuousness of the evidence of rape on which his sentence rests; the almost total lack of mitigating evidence presented at the sentencing phase of his trial,

despite the fact that petitioner is mentally ill and mentally retarded, and has a background of the most extreme deprivation; and the muddled and idiosyncratic defense provided by petitioner's inexperienced trial counsel. It was for all these reasons that the South Carolina Supreme Court concluded that respondent was entitled to relief based on "the unique and compelling circumstances" of his case. Butler v. State, Order at 2; App. to Pet. for Cert. at 39.

For these reasons, respondent's case does not satisfy any of the criteria set forth in Rule 10 of the Rules of this Court. Based on all the circumstances, the South Carolina Supreme Court concluded that there was a "`violation, which, in the setting, constitute[d] a denial of fundamental fairness shocking to the universal sense of justice.'" Butler v. State, supra, at 39 (quoting State v. Miller, 16 N.J. Super. 251, 84 A.2d 459 (N.J. Super. Ct. A.D. 1951) (emphasis added by South Carolina Supreme Court)). Therefore, because there are no special and important reasons warranting the granting of certiorari in this case, the petition should be denied.

Finally, the fact that the South Carolina Supreme Court was so obviously motivated by a desire to reach a fundamentally fair result means that there is no likelihood that any different judgment would ultimately be reached on remand should this Court grant certiorari and disapprove the legal reasoning which led the state court to grant relief. This is particularly plain in the state court's remarks concerning the legal significance of respondent's mental retardation. Citing newly-acquired information

about respondent's severe mental disabilities, the state court discerned "serious questions whether [respondent] even understood the proceedings" when he made his decision whether to testify at his capital trial. Butler v. State, Order at 2; App. to Pet. for Cert. at 39. At this same time, the court cited South Carolina case law which requires special care in accepting waivers of constitutional or statutory rights from mentally retarded defendants, State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988). Butler v. State, Order at 2-3; App. to Pet. for Cert. at 37-38. This discussion makes clear that the South Carolina Supreme Court has already found the conduct of respondent's trial insufficiently responsive to his mental retardation--retardation of which the trial judge was unaware during the guilt phase of the trial.

Under these circumstances, it is inconceivable that the South Carolina Supreme Court's view of the basic equities of this case will be so transformed by any intervening critique of its legal analysis that the state court would order petitioner's electrocution on remand.[12] The intervention prayed for by the Attorney General stands no chance of affecting the result of these proceedings, and amounts to a request that this Court review not the judgment of the South Carolina Supreme Court but its opinion. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). In view of the state law basis of the South Carolina Supreme Court's judgment, the lack of any substantial reason why certiorari should be granted,

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[12]The present petition for habeas corpus was filed in response to the state's motion to set a date for his execution.

and the fact that the state court's judgment has at last afforded the opportunity for substantial justice in this case, the state's effort to have this Court review the basis of the South Carolina Supreme Court's ruling is without merit.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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BY: 
ATTORNEYS FOR RESPONDENT

* Counsel of record

October 18, 1990

No. 90-498

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF SOUTH CAROLINA,

Petitioner,

v

HORACE BUTLER,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the brief in opposition to the petition for writ of certiorari to the Supreme Court of the State of South Carolina in the above captioned matter have been served upon opposing counsel by placing one copy of the same, properly addressed and postage prepaid, in the United States Mail this 17th day of October, 1990.

John H. Blume

Sworn to and subscribed before
me this 17th day of October, 1990.

Catherine A. Gulley
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 6/10/91.

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October 17, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: State of South Carolina v. Horace Butler
No. 90-498

Dear Mr. Spaniol:

Enclosed please find the original and nine (9) copies of a Brief in Opposition to Petition for Writ of Certiorari and Appendix, with proof of service, in the above captioned matter.

Very truly yours,

John H. Blume

JHB/cag
Enclosure

c: David I. Bruck, Esq.
Donald J. Zelenka, Esq.
Horace Butler

(3)

No. 90-498

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF SOUTH CAROLINA,

Petitioner,

v

HORACE BUTLER,

Respondent.

APPENDIX TO

BRIEF IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

HORACE BUTLER,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and T. TRAVIS MEDLOCK, Attorney General of South Carolina,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Horace Butler prays that the Court grant a writ of habeas corpus vacating his conviction for murder and sentence of death. S.C. Const. art. V, §5 (1976); S.C. Code §14-3-310 (1976). This petition is based on the fact that the trial judge in his case, the Honorable C. Anthony Harris, committed during petitioner's trial the identical error which later led this Court to reverse the convictions and death sentences imposed by Judge Harris in State v. Pierce, 289 S.C. 430, 346 S.E.2d 707, 710 (1986) and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441, 443 (1986). See also State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). Because Gunter, Pierce and Cooper were not decided until after this Court affirmed the denial of petitioner's application for post-conviction relief, Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert.

denied, 474 U.S. 1094 (1986), the claim which he now raises was not previously available to him, S.C. Code §17-27-90 (1976), and could not have been raised any earlier than two weeks ago, when, on April 23, 1990, his prior collateral challenge to his conviction was finally denied by the United States Supreme Court. Butler v. McKellar, ___ U.S. ___, 110 S.Ct. 1212, reh. denied, 47 Cr.L. 3024 (1990).[1]

FACTUAL BASIS OF PETITIONER'S CLAIM

Petitioner Horace Butler was tried for the murder of Pamela Lane. When petitioner's trial counsel announced that the defense intended to rest without calling petitioner to testify on his own behalf, the trial judge initiated a lengthy monologue in which he warned petitioner no fewer than seven separate times that the jury would likely hold his failure to testify against him, regardless of the instructions of the court. Tr. 871, line 21 to 877, line 3.[2] Throughout most of this discussion, petitioner was confused and bewildered: other than "Yes, sir," all of his responses were to the

[1]Petitioner's counsel are also at this time attempting to determine whether any claims not previously considered, but still available to petitioner, Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982), will be raised on petitioner's behalf. By raising this single ground for relief here, counsel do not suggest that no other issues remain to be considered. As (and if) such claims are identified, they will be brought to the attention of the appropriate court as quickly as possible. However, inasmuch as counsel believe that the present claim is clearly meritorious, is apparent from the face of the record, and entitles petitioner to the relief he seeks, counsel have raised this claim at the earliest possible time by means of this habeas corpus petition, without regard to whether additional claims might be uncovered during counsel's more comprehensive review of petitioner's case.

[2]This portion of the trial record is reproduced in its entirety as Appendix A infra.

effect that he did not understand, Tr. 872, line 21, Tr. 873, lines 11-12, that he could not answer, Tr. 873, lines 23-25, that he wanted to talk to go into a room to talk to his lawyer, Tr. 874, lines 21-24, and that he wanted the judge to repeat his questions. Tr. 876, line 9. The record now before this Court (though not before the trial judge or jury) reveals that petitioner is mildly mentally retarded. Butler v. State, supra, 334 S.E.2d at 815; see also, Appendix B, infra (Summary of Psychological Evaluation by Dr. David R. Price, May 2, 1990).

Petitioner ultimately did not testify in the guilt-or-innocence phase of the trial. However, he subsequently gave up his right to remain silent by making a brief unsworn statement to the jury at his sentencing hearing. Tr. 1015, lines 21-25. Prior to petitioner's making this statement, the trial judge advised him of his right to testify or not, and of his right to make a closing statement. However, the judge did not advise petitioner of his right to decline to make any statement at all. In addition, the judge neither retracted nor modified his earlier admonitions about the peril in which petitioner would place himself if he failed personally to tell the jury his side of the story. Tr. 994, line 10.

In the statement which petitioner ultimately made to the jury, he denied committing the murder for which he already stood convicted, and he pleaded for mercy. Tr. 1015, lines 21-25. The statement included no expression of remorse for the crime, and its effect of the statement on the sentencing jury is unclear from the

record. After hearing this statement, the closing arguments of counsel and the trial judge's instructions, the trial jury deliberated for a little less than three hours and sentenced petitioner to death.

On October 2, 1985, nearly five years after petitioner's trial, nearly four years after his death sentence was affirmed on direct appeal, and some five weeks after this Court affirmed the denial of petitioner's application for post-conviction relief, the Court for the first time held that a substantially identical series of statements made to a criminal defendant by Judge Harris constituted reversible error. State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985).[3] The following year, while petitioner's case was already pending on habeas corpus review in federal court, the Court followed Gunter in reversing two capital convictions on the basis of an identical series of statements by Judge Harris. Significantly, in each of these cases, as here, the defendant did not testify at the guilt phase after hearing Judge Harris' admonition. State v. Pierce, supra; State v. Cooper, supra.

Petitioner's federal habeas corpus petition was finally denied just fifteen days ago, on April 23, 1990, Butler v. McKellar, reh. denied, 47 Cr.L. 3024 (U.S., 1990), and he now seeks to avail himself of this first opportunity to have his case reviewed under the doctrine established in Gunter, Pierce and Cooper.

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[3]Petitioner's trial ended on January 26, 1981. His conviction was affirmed on direct appeal on February 22, 1982, and the Court's opinion affirming the denial of post-conviction relief was filed on August 27, 1985. State v. Gunter was filed on October 2, 1985.

THE ERROR IS IDENTICAL TO THAT COMMITTED IN PIERCE AND COOPER

In State v. Pierce, supra, decided on July 21, 1986, the Court held that Judge Harris committed reversible error when he advised the defendant as follows:

> I tell you that the jury will hold it against you, the fact that you did not testify . . . . I am going to charge them that the law does not permit them to hold it against you, but they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but wonder why he did not tell us his side of it.

346 S.E.2d at 710. Most significantly, the Pierce Court unanimously rejected the state's claim that these potentially coercive statements should be disregarded as harmless because Pierce ultimately did not testify. As the Court noted,

> Although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error.

Id. Four months later, confronted with a virtually identical fact situation in another case tried by Judge Harris, the Court handed down an identical decision reaffirming its prior holdings in Gunter and Pierce. State v. Cooper, supra.

If there are any differences between the case at bar on the one hand, and Pierce and Cooper on the other, they are such as to make petitioner's claim substantially stronger than those upheld in Pierce and Cooper. Neither Pierce nor Cooper were mentally retarded. Petitioner is. This fact alone increased the risk of prejudice arising from petitioner's exposure to Judge Harris'

confusing and intimidating admonitions about the likelihood that the trial jury would ignore its instructions and convict him based on his silence at trial. The trial transcript indicates that petitioner actually was upset and confused by Judge Harris' statements at this critical juncture of the trial. And in view of petitioner's intellectual disability, the fact that the trial judge finally elicited a few "Yes, sir" responses to his insistent questioning affords no adequate basis for concluding that petitioner's rights were unaffected by the coercive and unconstitutional procedure employed here. See State v. Arthur, 296 S.C. 495, 374 S.E.2d 291, 293-294 (1988) (knowing and intelligent waiver not established by mentally retarded defendant's assent to leading questions).

A second difference between this case and Pierce and Cooper is that here the trial judge repeated his improper statements over and over again. They occupy more than five full pages of transcript, and could scarcely have been any more emphatic. Unlike Pierce and Cooper, where the improper statements quoted in the Court's opinions were relatively brief, Judge Harris admonished petitioner no fewer than seven times--three times before he left the courtroom to talk to his lawyer, and four times after his return--that his failure to testify entailed a grave risk, and that the court's instructions would probably prove ineffective in preventing the jury from using petitioner's silence as proof of his guilt. Under these circumstances, the errors committed here were substantially more prejudicial than those committed in Pierce and

Cooper, and should lead to the same result.

Respondents may argue that Pierce and Cooper should be overruled to the extent that they require reversal even where the trial judge's potentially coercive statements does not produce an immediate waiver of the defendant's right to remain silent. For the reasons stated in Pierce, such an argument should not be accepted. Furthermore, since petitioner did waive his right to remain silent at sentencing when he stood before the jury and made his plea for mercy, the possibility that Judge Harris' statements did affect petitioner's decision-making process is plain.[4]

JUSTICE REQUIRES THAT RELIEF BE GRANTED

On remand, both Marcellus Pierce and Kamathene Cooper were resentenced to life imprisonment. To permit Horace Butler to go to his death when these other convicted murderers were spared, simply because his case was appealed before the constitutional

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[4]That this statement was intended to be mitigating and was not subject to cross-examination does not, of course, remove it from the protections of the Fifth Amendment. See Estelle v. Smith, 451 U.S. 454 (1981). Furthermore, petitioner's statement may have been ill-advised for a number of reasons. First, the jury may have been offended by petitioner's failure to express remorse for Ms. Lane's murder. Second, petitioner's tone or demeanor may have seemed inappropriate. Third, given the total absence of any reliable expert testimony on the extent of petitioner's mental disabilities, petitioner's brief talk may given the jury an opportunity to make an uninformed but potentially fatal "guesstimate" of his level of intellectual functioning, based on jurors' personal experiences with retardation, or their preconceived opinions about what mentally retarded people are like. Finally, the jury might have concluded from the unexplained brevity of petitioner's statement that he had nothing to offer by way of mitigation or excuse for his crime. For all of these reasons, a reviewing court cannot fairly discount the possibility that petitioner was prejudiced by this statement, and by any judicial coercion which may have affected his decision to make it.

error which occurred at his trial was first identified by this Court, would amount to a miscarriage of justice. This injustice, moreover, is compounded by a number of factors. These include: the fact that petitioner's Fifth Amendment rights were unquestionably violated by the manner in which the police obtained his confessions; the tenuousness of the evidence of rape on which his sentence rests; the almost total lack of mitigating evidence presented, despite the fact that petitioner is mentally retarded; and the muddled and idiosyncratic defense provided by petitioner's inexperienced trial counsel. In recalling these factors, petitioner does not ask the Court to revisit legal claims which have already been reviewed on direct appeal or on post-conviction relief. Rather, he seeks only to have the Court view this case as a whole, in order that justice might finally be done.

1. Pretrial Fifth Amendment violation

It is now clear that petitioner's confession to the murder of Pamela lane would be inadmissible under present-day constitutional standards. Arizona v. Roberson, 486 U.S. 675 (1988); State v. Howard, 296 S.C. 481, 374 S.E.2d 284, 288-289 (1988). The evidence establishes that after petitioner asserted his right to counsel in connection with an unrelated charge, the police waited until the attorney left the jail and then subjected petitioner to an all-night interrogation which eventually produced a confession. The United States Court of Appeals for the Fourth Circuit has acknowledged the unconstitutionality of this procedure under present-day Fifth Amendment standards. Butler v. Aiken, 864 F.2d 24 (4th Cir.

1988). But a five-to-four majority of the United States Supreme Court has now held that petitioner's conviction and sentence must remain undisturbed on federal habeas review, despite the patent illegality of the police methods used to obtain them, simply because these methods were arguably legal at the time they were employed. Butler v. McKellar, ___ U.S. ___, 110 S.Ct. 1212 (1990). Whatever the merits of this ruling as a matter of federal habeas corpus procedural law, it means that petitioner remains on death row even though the Supreme Court has implicitly recognized that his Fifth Amendment right to remain silent was violated by the Charleston County police.

This Court's intervening decisions in Gunter, Pierce and Cooper now make clear that petitioner's Fifth Amendment rights were also violated by Judge Harris in the courtroom itself. For this error to go uncorrected as well, and for this mentally retarded prisoner to die on the basis of such compounded unfairness, is something which the Court ought not to permit.

2. Weakness of evidence of rape

The evidence of rape was entirely circumstantial, and the trial judge indicated prior to the sentencing hearing that he was "extremely dubious" as to whether this evidence was sufficient to submit to the jury. Tr. 953, lines 1-6. Although he ultimately did allow the jury to consider the issue of rape, and although this Court affirmed on the basis that "any evidence . . . tending to prove the guilt of the accused creates a jury issue." State v. Butler, 277 S.C. 452, 290 S.E.2d 1, 4, cert. denied, 459 U.S. 932

(1982) (emphasis in original), the evidence is undeniably weak.[5] No directly corroborative physical evidence was found, and an FBI expert testified that a Negroid public hair found on the victim's blouse "absolutely did not come from Mr. Butler." Tr. 658, line 4 to 660, line 3. At the same time, the witness could not exclude the possibility that the hair had come from the state's key witness against petitioner, Larry White. Tr. 659, lines 4-12. A determination as to whether Group A blood factors found in the victim established the involvement of an unknown sperm donor was precluded by the inexplicable failure of medical authorities to test the victim to determine whether she was a "secretor." Tr. 672, lines 21-23. In sum, the proof of rape in this case is far from "virtually undebatable," and the ambiguity and doubt surrounding the issue distinguishes this case from every other in which the death penalty has been imposed and upheld. State v. Adams, 279 S.C. 228, 306 S.E.2d 208, 215, cert. denied, 464 U.S. 1023 (1983). ("It is our observation that a unanimous jury in South Carolina has ordered the death penalty only in those cases where the proof of facts is virtually undebatable . . . .").

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[5]The prosecution appears to have taken the same view of the strength of its evidence of rape, since it did not indict and try petitioner for the substantive offense of criminal sexual conduct. Instead, the solicitor reserved the question of rape for the sentencing phase, when petitioner had already been convicted of murder, and when the jury knew that it could not sentence petitioner to death unless it first found the murder to have been committed while in the commission of rape.

3. Adequacy of petitioner's defense at trial

Horace Butler was defended by a lawyer who had never handled a murder case before, PCR 328, line 15 to 330, line 10, who would not have been qualified for appointment as lead counsel for an indigent capital defendant, State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988); who refused offers of assistance from more experienced attorneys as well as of state funding for expert or investigative services, PCR 112, line 6 to 113, line 21, 115, line 6 to 116, line 2, 347, lines 3 to 23, and whose performance throughout the trial was heartfelt but muddled and confused. Regardless of whether this lawyer's performance actually fell below minimum constitutionally acceptable standards, Butler v. State, supra, the fact remains that any experienced defense counsel would likely have been able to secure a life sentence for Horace Butler. At a minimum, experienced counsel would have had a psychological evaluation performed, and would have presented the results to the sentencing jury. That petitioner's counsel did not take even this rudimentary step distinguishes this case from virtually every other capital case to have been affirmed by this Court. Experienced counsel would also have ensured that the jury learned about the grinding poverty and profound social isolation of Horace Butler's formative years, and about the evidence of untreated mental illness which left him unable to function away from his immediate family.[6]

[6]Testimony at petitioner's post-conviction relief hearing revealed a twenty-one-year old man who was afraid of the dark, PCR 165, line 20 to 166, line 12, and required a family member to escort him from the car to the house at night. PCR 19, line 12 to 20, line 3; 210, line 12 to 211, line 18.

But none of this evidence was presented at Horace Butler's trial, and as a result the sentencing jury was forced to decide whether he should live or die without the benefit of the most basic factual information about the man whose life rested in their hands.

The lack of any substantial case in mitigation is especially troubling in the wake of Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2765 (1989). While the Penry Court narrowly rejected a categorical bar on the execution of the mentally retarded, accord State v. Jones, ___ S.C. ___, 378 S.E.2d 594 (1989), Penry recognizes the special significance of mental retardation as a mitigating factor which bears an especially close relationship to a defendant's moral blameworthiness. But petitioner was consigned to death by a jury which did not know of his mental retardation, and thus could not have considered it in mitigation. While the jury did know of petitioner's school record, the jurors may well have ascribed his lack of academic achievement to simple laziness rather than to the crippling lifelong mental disability which was its true cause.

It is one thing to say, as did the Supreme Court in Penry, that a jury may sentence a mentally retarded offender to death after carefully considering the relationship between his disability and his crime. But it is quite another to permit such a sentence to be imposed by a jury which does not even know of the offender's retardation. This Court has previously held that trial counsel's failure to present competent evidence of petitioner's handicap did not meet the high standard of materiality required to establish a Sixth Amendment violation under Strickland v. Washington, 466 U.S.

668 (1984). Butler v. State, supra. But this holding does not change the troubling fact, made all the more apparent by Penry, that petitioner was sentenced by a jury which lacked the most basic facts necessary to make an informed assessment of his moral culpability.

CONCLUSION

Petitioner has summarized these facts merely to illustrate that the granting of relief is required not only by the legal principles established in Gunter, Pierce, and Cooper, but by simple justice and basic fairness as well. In the final analysis, this Court sits to ensure that every citizen, no matter how disabled, is accorded substantial justice in the courts of this state. This requirement is especially called into play when an individual's life is at stake. The litigation in this case has been lengthy, but it has yet to produce a fundamentally fair result. Petitioner's conviction and death sentence should be vacated, and his case should be remanded for a trial at which, represented by competent counsel, he will at last receive one fair hearing before a jury of his peers.

Respectfully submitted,

JOHN H. BLUME
DAVID I. BRUCK
ARTHUR G. HOWE
GEDNEY M. HOWE, III

By: David I. Bruck
ATTORNEYS FOR PETITIONER

May 9, 1990

APPENDIX A:

RECORD EXCERPT

APPENDIX B

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

HORACE BUTLER,

PETITIONER,

vs

PARKER EVATT, Commissioner, South Carolina Department of Corrections; and T. TRAVIS MEDLOCK, Attorney General of South Carolina,

RESPONDENTS.

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND OPPOSITION TO PETITION FOR STAY OF EXECUTION

The Respondents, above named, hereby make a Return to the Petition for Writ of Habeas Corpus and Opposition to Petition for Stay of Execution made by Horace Butler dated May 9, 1990. The Respondents would respectfully show this Court that in light of a review of the procedural posture in which Mr. Butler's case is currently, the prior proceedings and decisions by this Court and the lower court in South Carolina in this case, as well as the denial of a showing of a deprivation of any constitutional right that should require a new trial in this particular matter, Respondents would respectfully submit that the Petition for Writ of Habeas Corpus and Petition for Stay of Execution be denied and dismissed on both procedural and substantive grounds. The Respondents would respectfully show this Court the following:

I.

Re-review of Mr. Butler's conviction is not warranted under the procedures of this Court.

In his Petition before this Court, Mr. Butler contends that three decisions of the Supreme Court of South Carolina decided after its review of his conviction and sentence on direct appeal and state post conviction relief require this Court to grant him a new trial, even though the Petitioner wholly fails to set forth a constitutional or statutory deprivation that affected the outcome of either his guilt phase trial or sentencing phase trial. This is particularly significant in this case where an in favorem vitae review on appeal and the fuller development of a record through extensive post conviction relief hearings resulted in a trial judge, during the post conviction relief proceedings, making the following findings of fact and conclusions of law:

> The Applicant also alleges that he desired to testify in the guilt phase in front of the jury about the circumstances of his statement. During the trial, the trial court made inquiry of the Applicant about the decision not to testify. (Tr. pp. 871-877). During the inquiry, the Applicant testified that he agreed with his lawyer's strategy not to have him testify, understanding the advantages and disadvantages. (Tr. pp. 871-872, 874-875). His statements in open court carry a presumption of verity which the Applicant has wholly failed to rebut in this proceeding. Blackledge v. Allison, 431 U.S. 63 (1977). "This Court finds that counsel made an informed decision not to call the Applicant in the guilt phase to testify. Counsel's tactical decision was based upon the Applicant's version of

> the facts, the effect of the reply testimony that Margo Brown, his ex-girlfriend, could give and the ramifications of cross-examination by the Solicitor. This Court, in hindsight, cannot find counsel performed outside of the standard of competence in not urging the Applicant to testify. His allegation must be denied.

(PCR App. pp. 419-420). (Order of Judge Fields entered January 28, 1984). These findings of fact by Judge Fields in the 1984 state post conviction relief proceeding were made after the Court was made aware of Mr. Butler's mental state having been presented by a psychological team during the state post conviction relief hearing that Mr. Butler was of low mentality. See (Testimony of Michael Fish and Dr. John Roitzsch, PCR App. pp. 130-159, including testing results which placed Mr. Butler's IQ level as a mildly mentally retarded individual). Further, Mr. Butler and his trial counsel, Mackey Hill, testified about the decision and reasons as to why Mr. Butler was making the decision not to testify during the guilt phase and penalty phase of the trial. (PCR App. pp. 237-238, 254-255, 312-314, 319-320, 366-367). Unlike the situations in Pierce, Cooper, or Gunter, in which a full record was not available to the Court for its review, here in the post conviction relief proceedings in 1984-1985, the Court had the trial record and the state post conviction relief record in which to make its decision as to whether or not the Petitioner freely and voluntarily waived his right to testify during his earlier trial. As stated before, this situation is in a much

different procedural posture than the prophylactic rules created in State v. Gunter, 386 S.C. 556, 335 S.E.2d 542 (1985), State v. Pierce, 289 S.C. 430, 346 S.E.2d 707, 710 (1986), and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441, 443 (1986).

Respondents would respectfully submit that the Petitioner erroneously is seeking the Writ of Habeas Corpus in this Court's original jurisdiction. Initially we note, as previously stated, that Petitioner had a full direct appeal in which in favorem vitae review was given on the record and the Court concluded that there was no prejudice in the record that affected the outcome of either the guilt or sentencing phase. State v. Butler, 277 S.C. 452, 290 S.E.2d 1, 4 (1982). Further, a state post conviction relief hearing was held in which a de novo review was made of the Petitioner's decision and strategy in not testifying on his own behalf. That matter was raised as a denial of a Sixth Amendment right to the effective assistance of counsel and findings of fact were made in that decision that carry at this stage a presumption of correctness. At the outset, this Court has consistently held that state habeas corpus proceedings are not a substitute for an appeal. Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). The Petitioner, however, is seeking not only to utilize this process as a substitute for an appeal but further as a substitute to the statutory state post conviction relief proceedings and an

earlier failure to be successful in those proceedings. Under South Carolina law, state post conviction relief proceedings "comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them." S.C. CODE ANN., Section 17-27-20(B). Further, it states in that same section that post conviction relief is not a substitute of direct review of the sentence or conviction. Id.

Similarly, the earlier litigation as to whether the Petitioner waived his right to testify determined both from the trial record and the state post conviction relief record should preclude reconsideration in any subsequent state post conviction relief proceeding which bars successive applications for post conviction relief under Section 17-27-90 and Supreme Court Rule 50(3).

While not describing the constitutional right that he was deprived of which led to an erroneous conviction or sentence, the Petitioner contends that until May 9, 1990, the claim which he now raises was not previously available to him, even though he cites decisions upon which to base his request in 1985. Respondents are unaware of any impediment between 1985 and 1990 that would have necessarily precluded his right of access to the state courts, other than the Petitioner or counsel's own design and desires, except for the successive application rule in state post

conviction relief. This is particularly insightful when the issue concerning the decision not to testify appeared to be abandoned during the federal habeas corpus proceedings which were denied by United States District Judge G. Ross Anderson, Jr. Butler v. Aiken, C/A No. 86-1093-3 (June 9, 1987). The Supreme Court of South Carolina has similarly held that claims that had been raised in a prior habeas corpus proceeding in federal court or that could have been raised therein but were not were barred under the doctrine of res judicata in a subsequent state proceeding for post conviction relief. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Simply put, during the state post conviction relief proceedings heard by this Court and before Judge Fields in 1984 and 1985, the Petitioner was contending that the decision to waive his right to testify during his trial was not knowingly and voluntarily made with the assistance of counsel and based upon the entire record, including subsequent testimony of trial counsel and Mr. Butler himself, the state court concluded that that decision was knowingly made with an understanding of the advantages and disadvantages of his right to testify. The attempt to relitigate this claim after a full and fair factual determination, after the South Carolina courts had decided that the decision not to testify was freely and voluntarily made and based upon sound strategic reasons by defense counsel, is procedurally barred.

Similarly, here the jury that decided Mr. Butler's guilt and innocence was advised concerning the defendant's decision not to testify that

> Any person who elects to exercise that constitutional right not to testify is entitled to not have that fact considered by the jury which listens and makes the decision as to his guilt or innocence. I am instructing you that you would not in any way consider in your deliberations the fact that this defendant has not testified. You will not even mention it when you go back to the jury room. Put it from your mind and it makes no difference anyhow because, as I have charged you, the state has the responsibility of proving the material elements of the crime of murder.

(Tr. p. 945, l. 16 - p. 946, l. 4). This Court must assume that the jury followed its instructions in making the decision concerning the guilt of Mr. Butler which was neither conflicting nor confusing with any statements previously given to the jury concerning its duty.

II.

The record before this Court reveals that the Petitioner was not compelled to testify by the comments of Judge Harris nor did those comments deprive the Petitioner of a fundamentally fair trial.

The unalterable fact around which Petitioner's entire Petition for Writ of Habeas Corpus agitates is that the Petitioner, fully apprised of his constitutional right to testify by both his own attorney and the trial judge, ultimately did not by strategic choice, testify under oath in the guilt phase or the sentencing phase of his trial.

The Petitioner did, however, choose to take advantage of a separate statutory right to make an unsworn statement to the jury at his sentencing hearing as to why the death penalty was not appropriate. (Tr. p. 1015). Section 16-3-20(B), Section 16-3-28.

Since 1981, the record of this case has revealed that Judge Harris, out of the presence of the jury, questioned the Petitioner as to whether he chose to testify or desired to remain silent. (Tr. pp. 871-872). Petitioner answered the first four questions as to whether he understood his rights and agreed with his counsel's strategy that he not testify with an unequivocal (yes, sir). When the judge's further questioning, designed to ensure Petitioner's full comprehension of his rights, revealed apparent confusion on the part of the Petitioner, the trial judge continued his attempts to apprise Petitioner of his rights, using variations of the issue he was trying to get across, in order to find the language Petitioner might most easily understand, this dialogue between the trial judge, Petitioner, and counsel for the Petitioner was necessary as a part of the following question:

> COURT: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not testifying, is that correct? In other words, you have talked about the risk you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?
>
> MR. HILL: He doesn't <u>understand</u>, Your Honor.

(Tr. p. 872, ll. 15-21). After further inquiry in this matter, based upon the desire of a cautious trial judge to ensure Petitioner's knowledgeable exercise of his constitutional rights, a recess was taken in which the trial counsel met with the Petitioner. (Tr. pp. 874-875). The court then concluded a similar inquiry which satisfied the trial judge that the decision not to testify was both a knowing and voluntary decision. (Tr. pp. 875-877).

Assuming arguendo, that a petition for writ of habeas corpus is the appropriate procedural vehicle, this case would be the first case solely reversed on the basis of such comments by the trial judge where the record is clear that the Petitioner was not compelled to testify by the language used by the trial judge in his inquiry when he, in fact, did not testify. See State v. Cooper, supra, (reversible error in trial judge's error in qualifying as a juror a uniformed officer of the South Carolina Highway Patrol); State v. Pierce, supra, (reversible error in jury charges in a criminal prosecution that the jury was not to deliberate about the case until it was concluded where the trial judge was determined to have invited the jury to prematurely deliberate the case on the basis of the particular language used); State v. Gunter, supra, (Gunter testifies after statements made by the trial judge that "you know that the jury is going to hold it against you. You know that, don't you ... if you do not testify.")

Respondents would argue that assuming arguendo that the particular statements of the trial judge in this matter were inappropriate, any error was harmless based upon a view of the entire record and cannot sustain a vacation of the Petitioner's conviction. A number of cases involving the same or similar issues in other jurisdictions provides clear support for the Respondents' position in this case that any error under the unique facts of this case are harmless error beyond a reasonable doubt. (Respondents take the position that Rule 8, Section 10, of the Rules of the Supreme Court concerning asking permission to argue against the decision of this Court are not applicable since that involves briefing, but to the extent necessary we would request that this Return be construed as such a Petition).

In a case remarkably similar to the situation at hand, the Court of Special Appeals of Maryland has held that a trial judge's explanation of a defendant's right to testify in which he acknowledged that the juror might infer from defendant's failure to testify that he was guilty, did not constitute reversible error. Wooten-Bey v. State, 547 A.2d 1086, (Md. App. 1988) aff'd. 568 A.2d 16 (Md. 1990). In Wooten-Bey, the trial judge stated to the defendant:

> The Court ... let me see if I can address it to you in layman's terms. If you choose not to take the witness stand, part and parcel of what goes along with that is the possible disadvantage that someone on that jury panel is going to say, look, this guy is obviously guilty, because guilty people hide. And innocent people are willing to

> talk. That could happen and all the judges' instructions in America cannot overcome a person who is of contrary mind, if you know what I mean. I sit there and say you ~~can't~~ do this, and they say, the hell I can't. So if you don't testify, obviously one of the disadvantages that could go along with not testifying, it doesn't mean it will. If they listen to my instructions to a fare thee well and most jurors do. It is my experience that they follow judges' instructions right down the line. Then that adverse part would not play a part. I cannot tell you, you are saying to me, but what is this business about Harvey getting to cross-examine me? Well, if you do take the witness stand, Harvey, Mr. Harvey will have the right to cross-examine you. You may choose not to. Although honesty impels me to say, I can't conceive of that. Ibid at 1093.

In Wooten-Bey, the defendant did take the stand (unlike the instant situation in Butler) and testify and the Court of Appeals found that the issue before them was "whether appellant was misled and induced by the trial judge's explanation into taking the stand, thus risking the juror's exposure to his prior criminal record." The court then found that the defendant, from statements contained in the trial record, had made the decision to testify "long before the trial judge made these allegedly erroneous comments" and that therefore, in light of the fact that the trial judge covered the basics, on defendant's right not to testify and his remarks, the trial judge did not err. The trial judge's comments were not found to be error in spite of the fact that the defendant there did testify, while in the instant case, Horace Butler did not testify just as he asserted he had chosen not to testify prior to Judge Harris' allegedly

offensive remarks. Just as the court in Wooten-Bey pointed out, if the remarks of the trial judge do not sway the defendant to a change of position, although his statements may be inappropriate, no reversible error has been committed.

In the case of United States v. Goodwin, 770 F.2d 631 at 637 (2nd Cir. 1985), the Court of Appeals found comments by a trial judge that may have coerced the defendant to testify allegedly in violation of the Fifth Amendment were a constitutional violation but that the violation was harmless beyond a reasonable doubt. In Goodwin, the defendant upon questioning by the trial judge as to whether she had decided not to testify responded "I don't know what would be best. Most of the things that have been brought out I just don't know. I feel that would probably be best." 770 F.2d at 636. The defendant affirmed that she understood her rights both to testify and not to testify and asked to speak with her sons for a few minutes. The judge's comments therein included language as to whether the jury would be desirous of hearing her position of innocence, that he was surprised by her decision about testifying and his impression was that she was going to maintain her innocence and take the position that the government witnesses were lying. The defendant later decided to testify, against the advice of her attorney. The Court of Appeals found that while they were certain the

defendant took the judge's comments into consideration in making her decision, her will was not overborne.

> Furthermore, even if the judge's comments did compel Goodwin to testify, in violation of the Fifth Amendment, we believe that the constitutional error was harmless beyond a reasonable doubt. Ibid at 637.

Again, as in Wooten-Bey, the effect of the judge's comments, whether or not they were actually coercive in nature, resulted in the defendant's decision to testify, whereas in the instant case, Horace Butler steadfastly held firm to his original decision, concurring in the advice of his attorney, not to testify concerning the facts and circumstances of his case in front of the jury.

In a related case, People v. Phillips, 542 N.E.2d 814 (Ill. App. 1989), the appellate court of Illinois held that a trial judge's requirement that the defendant had to testify immediately after the close of the state's case, if he were to testify at all, though erroneous was harmless error since the defendant had already made his decision not to testify prior to the trial as part of his defense strategy with his attorneys concurrence and therefore "there was no prejudice to the defendant as a result of this error." 542 N.E.2d at 819. Although the facts of the case are different, the situation and result are the same as in this case where Butler had earlier made his decision not to testify as part of the defense strategy prior to the questioning by the judge and stuck to that decision.

Clearly, on the face of this entire record, harmless error resulting from the inquiry of Judge Harris is clear and irrefutable. When the Supreme Court addressed the decision in State v. Pierce, a case that was reversed for an additional reason concerning the deliberation comments, the Supreme Court of South Carolina concluded in that case that it was virtually impossible to determine the actual effect the judge's improper statements had on Pierce in that although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. In this case, unlike Pierce and Gunter, the trial judge did not state as a fact that "the jury will hold it against you the fact that you did not testify." State v. Pierce, 346 S.E.2d at 710, State v. Gunter, 335 S.E.2d 543. In the Butler case, the judge merely stated that there was a "serious risk" that the jurors may in fact wonder why he did not testify. The emphasis of the comments by Judge Harris in Gunter, Pierce, and Cooper, was that "it is going to be held against you, you know that." State v. Cooper, 353 S.E.2d 441 at 443. Further, unlike the other South Carolina cases, the situation in Butler was a direct response and full inquiry by a cautious trial judge when the defense attorney advised the court that his client did not understand the advantages and disadvantages of testifying. Accord State v. Arthur, 374 S.E.2d 291 (S.C. 1988), (acceptance of a waiver of a constitutional or statutory right by a mentally retarded individual requires that the

record clearly demonstrates that it was made knowingly and voluntarily and that such could be accomplished only through searching interrogation of the accused by the trial court, itself, including information necessary to "understand the significance of the right being waived"). See also Wright v. Estelle, 549 F.2d 971 (5th Cir. 1977), adhered to upon re-hearing, 572 F.2d 1071 (5th Cir. 1978) (even if defendant had been deprived of claimed personal constitutional right to testify on his own behalf when his attorney refused to let him testify in homicide prosecution, any error was harmless beyond a reasonable doubt, since defendant's testimony would not have altered verdict based upon the evidence which overwhelmingly connected defendant to the crime). Clearly, under the facts and circumstances of this case, the apparent prophylactic rule in State v. Pierce does not need to be applied in this case because a review of the trial record in necessary combination with the state post conviction relief hearing testimony of both Mr. Butler and Mr. Hill and the findings of fact by Judge Fields as a result of that hearing reveal that Mr. Butler freely and voluntarily waived his right to testify in the 1981 trial. A rule of automatic reversal under these circumstances where no constitutional right was infringed and the jury was properly instructed on the requirement that they not consider his failure to testify during their deliberations does not mandate a new trial either under the guilt or sentencing phase. Similarly, the language utilized by Judge

Harris during the Butler proceedings was stated in a precatory non-binding manner rather than the mandatory nature that the jury would hold it against him present in Pierce, Cooper, and Gunter. Simply put, when a jury trial renders a decision that is fundamentally fair and provides the defendant all of his constitutional rights, a determination vacating that decision and the prior acknowledgment of this Court in direct appeal and post conviction relief that there existed no errors that deprived the individual of a fair trial should not be vacated.

The Petitioner's current counsel creatively argues that even though Judge Harris' comments did not coerce the defendant in such a way to overbear his will and strategy not to testify in either the guilt or penalty phases, that it had a coercive effect which caused him to give an unsworn statement to the jury during the sentencing phase arguments. The obvious problem with this argument is that the Petitioner is complaining about two separate and distinct constitutional and statutory rights. There is nothing in any of the comments made by Judge Harris which reflects upon a decision of the defendant to make an unsworn argument to the jury as provided for specifically in South Carolina law. On the contrary, his decision to make the unsworn argument with the assistance of counsel as revealed in the state post conviction relief proceedings proves only that the Petitioner knew and was aware of the difference between testimony under oath and making an unsworn argument which

would not be subject to cross-examination. Furthermore, Petitioner had withstood Judge Harris' comments about the risks in not testifying in the earlier inquiry and did not suddenly make a new decision to give an unsworn statement. His strategic decision, previously decided upon, was not to subject himself to cross-examination or reply testimony. (PCR App. pp. 319-320). South Carolina law provides a capital defendant to make a statement to the jury about his reasons as to why the death penalty is not appropriate in those circumstances. Obviously, that decision can be guided by the strategic determinations of reasonable defense counsel to ensure the jury sees and has an understanding of the defendant even though he chose strategically not to testify. An assertion that the comments by Judge Harris coerced the invocation of such a statutory right on the basis of the entire record that is before this Court is clearly without merit.

The current posture of this case is one in which at the time of the original appeal the South Carolina Supreme Court reviewed the entire record in favorem vitae and concluded that there was no prejudice to the defendant that deprived him of a fundamentally fair trial and further after an omnibus state post conviction relief hearing that the defendant's constitutional rights were protected, specifically including a waiver of his right to testify in his trial. This matter currently demands finality in its conclusion that the trial rendered was fundamentally fair.

A review of this entire record which state post conviction relief necessarily allows such a conclusion. Accord Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). In Vickery, the Supreme Court of South Carolina concluded that state post conviction relief proceedings may be used to supplement inquiries concerning waivers in a jury trial situation where a trial court failed to make a record affirmatively show voluntariness of a plea. Similarly, in Jackson v. Denno, 378 U.S. 668 (1974), the United States Supreme Court held that the appropriate remedy was not a new trial where the record did not indicate whether an introduced confession was voluntary but rather for a remand solely before the judge to determine the voluntariness of the confession before a decision was made on granting a new trial when in fact no constitutional violation had occurred. Similarly, in this situation, a state post conviction relief judge has concluded that the defendant both strategically and knowingly and voluntarily waived his right to testify when that factual situation was presented to the court. Further, the Petitioner had the opportunity to raise that issue before the South Carolina Supreme Court in the appeal if it had deemed the state hearing judge's conclusion inappropriate. To apply Pierce, and suggest that reversal is mandatory in light of the entire record before this Court revealing no constitutional violation would be an error. In his pleadings, while not raising these matters as specific claims, Mr. Butler "does not ask the court to revisit legal

claims which have already been reviewed on direct appeal or on post conviction relief, but rather seeks to have the court view the case as a whole." Respondents assume by the nature of the pleading that the Petitioner is not asserting these three scenarios as new grounds as to why relief should be given. These conclusions have been fully litigated either in the federal court or the state court. Respondents would respectfully submit that reconsideration is barred and further that this Court should clearly state that the matters are not being considered on the merits to avoid unnecessary misinterpretation of this Court's rulings. In his first claim, he contends before this Court that Mr. Butler's confession was entered in violation of the Fifth Amendment. This issue was an issue that was litigated before the United States Supreme Court and relief was denied to Mr. Butler after full argument. See Butler v. McKellar, ___U.S.___, 110 S.Ct. 1212 (1990). Contrary to the position asserted in his pleadings, no court has established that this confession was entered in violation of Mr. Butler's Fifth Amendment rights. See Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988), which concluded "that Butler had failed to demonstrate that there was an actual violation of his constitutional rights in 1980." Further, in his second assertion, he challenges the sufficiency of evidence of rape which was previously rejected in the direct appeal as Exception 10 and specifically by this Court. State v. Butler, supra, 290 S.E.2d at 4. Clearly, these proceedings

cannot be used as a substitute for an appeal and, like post conviction relief, insufficiency of the evidence is not an appropriate ground. The Petitioner makes a vague reference in footnote 5 that the prosecution appeared to have thought that the physical evidence of rape was insufficient because it chose not to indict or try him for the substantive offense of criminal sexual conduct. Apparently, the Petitioner is not aware of a strategic reason to not charge the subsequent statutory aggravating circumstance in the guilt phase of the trial which is a regular practice among many solicitors. His speculation to the contrary simply lacks merit for relief. Further, in his third allegation he raises an issue again concerning the adequacy of Petitioner's defense at trial which was fully raised, litigated, and argued in the original state court petition. Without referring to it, the Petitioner has attached to his Petition a summary of a psychological evaluation which is unsworn concerning Mr. Butler's intelligence level. Apparently, current counsel are revising the position which they took in the state post conviction relief proceeding wherein they presented defense psychologists to testify about the Petitioner's intelligence level and challenging this Court's earlier decision that counsel performed competently in presenting the mental profile to the original jury. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Similarly, the matter was raised and denied by the Federal District Court and the United States Court of Appeals for

the Fourth Circuit. Each of these assertions, previously rejected by the Court are clearly unsupportable as a "new ground" and therefore must be procedurally barred and further do not, in tandem, justify the re-opening on the so-called Pierce claim.

WHEREFORE, having made Return, Respondents respectfully request that the Petition for Writ of Habeas Corpus and Petition for Stay of Execution be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

May 29, 1990
P. O. Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

HORACE BUTLER,

PETITIONER,

vs

PARKER EVATT, Commissioner, South Carolina Department of Corrections; and T. TRAVIS MEDLOCK, Attorney General of South Carolina,

RESPONDENTS.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, Chief Deputy Attorney General, who being duly sworn, deposes and says:

That he is one of the attorneys for the Respondents herein;

That there is a regular communication by mail throughout the State of South Carolina, and that this is a proper circumstance for service by mail; and

That he served the foregoing Return to Petition for Writ of Habeas Corpus and Opposition to Petition for Stay of Execution on the Petitioner by depositing three copies of the same in the United States Mail, postage prepaid, and addressed as follows:

David I. Bruck, Esquire
South Carolina Office of Appellate Defense
1122 Lady Street - Suite 301
Columbia, South Carolina 29201

This 29th day of May, 1990.

Donald J. Zelenka

SWORN to before me this
29th day of May, 1990.

(LS)
Notary Public for South Carolina
My Commission Expires: 6-1-92.

APPENDIX C

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

HORACE BUTLER,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and T. TRAVIS MEDLOCK, Attorney General of South Carolina,

Respondents.

PETITIONER'S REPLY

Respondents' Return consists of a long catalogue of reasons, most of them technical and procedural, why the Court should not treat the petitioner in this case as it treated the appellants in State v. Gunter, State v. Pierce and State v. Cooper. In this Reply, petitioner will respond to each of these asserted reasons. In addition, he will set forth a proposed method for determining claims in capital cases such as this one which will guard against miscarriages of justice while accommodating the state's interest in the finality of fairly-determined and reliable capital

sentences.

I.

Respondents' first contention is that petitioner's decision to waive or assert his right to remain silent at trial was reviewed by the post-conviction relief judge, and cannot be relitigated in this proceeding. Return at 2-6. This argument both misstates the issue raised in the post-conviction proceedings, and mischaracterizes the evidence adduced. In his PCR application, petitioner challenged the competency of defense counsel's advice concerning whether or not to take the stand. Significantly, the portion of the post-conviction judge's order now quoted by respondents refers to the fact that "counsel made an informed decision not to call the Applicant in the guilt phase to testify" (emphasis added). Leaving aside the fact that this decision was not counsel's to make, but a personal decision to be made by petitioner, neither the trial nor the post-conviction record shed any light on what petitioner thought and understood when he first declined to testify, and when he later addressed the jury at the sentencing phase. Nor has there ever been any realistic hope of reconstructing from petitioner's grossly impaired memory a reliable picture of how Judge Harris coercive and intimidating warning affected him, either at the guilt or punishment stages of the trial. The Court's statement in Pierce that "[i]t is virtually impossible to determine the actual effect the judge's improper statements had on [the defendant]" is all the more true here. While there is every possibility that Judge

Harris's statements confused and intimidated Horace Butler at the moment that he was making crucial (and, for him, very difficult and perplexing) decisions, there is no possibility that any post-trial evidentiary hearing, whether in 1984 or now, could have unscrambled the egg of this mentally retarded defendant's anxiety and bewilderment so as to identify just how prejudicial these statements were. Indeed, there is no reason to imagine that PCR counsel could have made such a determination by conferring with the client, two or three years after the trial. That is why this case, even more than Pierce and Cooper, justifies the presumption of prejudice which those cases unequivocally establish. And that is why respondents are wrong to insist that petitioner should somehow have raised his Pierce claim years before Pierce was decided, based only on his own memory of how Judge Harris's statements affected his thinking and decision-making during the trial.[1]

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[1]While respondents cite to portions of the PCR transcript as support for their claim that petitioner made a series of intelligent and uncoerced decisions regarding his testimony and statement to the jury, the evidence cited shows nothing of the kind. On direct examination at the PCR hearing, petitioner never clearly indicates whether he wanted to testify or not, and could not recall whether his attorney gave him any advice about testifying. PCR 237-238. His statements on cross-examination are equally ambiguous, and shed little light on what he was claiming as of 1984, let alone what happened at his 1981 trial. Mr. Hill, for his part, provides almost no information about his client's wishes at the trial: his PCR testimony is concerned entirely with his own decisions concerning what was best for the client, and almost nothing about what petitioner himself may have thought or felt during the course of the trial. PCR 312-314; 319-320; 366-367.

Later in their Return, respondents make the extraordinary claim that Judge Harris's admonitions about the dangers of failing to testify should be treated as evidence of that special solicitude for the rights of a mentally retarded defendant to which this Court later referred in State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988). Return at 14. There are at least two reasons why this assertion should be rejected. First, in its reliance on leading questions and monosyllabic answers, the colloquy closely resembles the one which the Court found to constitute reversible error in Arthur. Secondly, and even more tellingly, respondents have overlooked the fact that the trial judge did not know that petitioner was mentally retarded. Indeed, the only evidence on this issue which the trial judge heard was an elementary school principal's grossly erroneous estimate, made without benefit of testing or pertinent records, that petitioner's IQ was between 85 and 95. Tr. 93, lines 22-24. Any doubt concerning the trial judge's lack of appreciation of petitioner's mental disability is removed by the Report of the Trial Judge on file with the Clerk of this Court, in which Judge Harris expresses his opinion that petitioner's intelligence level is "average." Under these circumstances, respondents' attempt to characterize Judge Harris's prejudicial and erroneous statements as some sort of special accommodation to petitioner's mental

impairment is utterly meritless.[2]

Respondents also seek to assert as a procedural bar petitioner's failure to raise his Pierce claim in a successive state PCR application during while his habeas corpus petition was progressing through the federal courts. Return at 5-6. In effect, respondents seem to be urging this Court to create a new procedural rule requiring post-conviction litigants to bring successive applications based on newly-available claims even while other collateral litigation is still underway, and then to apply this brand-new rule to bar consideration of petitioner's case. This suggestion is so obviously unfair as to merit no further discussion. Terrell v. Morris, ___ U.S. ___, 110 S.Ct. 4 (1989) (state may not apply new procedural default rule retrospectively to litigants who lacked notice of the rule).

Turning to the merits of petitioner's Pierce claim, respondents first attempt to distinguish the cases upon which

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[2]It need hardly be added that this record demonstrates why a basic mental health evaluation is undertaken in virtually every capital case tried in this state. Had this elementary precaution been taken here, Judge Harris would have known that petitioner suffered from a serious mental handicap which affected every aspect of his life, including his comprehension of trial proceedings and his ability to make decisions concerning the assertion or waiver of his legal rights. In the absence of such information, however, the trial judge seemed to have mistaken petitioner's incomprehension and confusion for manipulative behavior. See, e.g., Tr. 875, lines 15-20 ("Advise him of what I am trying to do. I am not trying to get him to change his mind or anything, but I am not going to waste three days of my time and yours and these jurors by having him say I don't know. He is going to have to tell me something before we proceed with the trial.").

petitioner relies on the grounds that the defendant in Gunter testified after hearing Judge Harris's statements, while Pierce and Cooper were reversed on more than one ground. Nothing in either Pierce or Cooper suggests, however, that the Court would have affirmed but for the existence of additional errors, and the Court's emphatic condemnation of the trial judge's statements indicates otherwise. Moreover, in pointing out that Cooper was also reversed due to the erroneous qualification of a highway patrolman as a juror, respondents have overlooked this Court's recent decision in State v. Green, Opinion No. 23181 (S.C., March 19, 1990), which expressly stated that the erroneous juror qualification was not a ground of reversal in Cooper.

Next respondents request permission to seek overruling of Pierce and Cooper, and cite three noncapital cases from other jurisdictions. None of these cases are apposite. In Wooten-Bey v. State, 547 A.2d 1086 (Md. App. 1988), aff'd on other grounds, 568 A.2d 16 (Md. 1990), the court found a coercive series of statements by the trial judge to be harmless error because at the time they were made, the defendant, an "articulate and well-educated . . . college graduate," had already clearly announced his firm intention to testify. United States v. Goodwin, 770 F.2d 631 (7th Cir. 1985), involved an appeal of a securities-fraud conviction and thirty-month sentence. Although the Seventh Circuit acknowledged the case to be a close and troubling one, 770 F.2d at 637, it ultimately decided that the defendant had not

been coerced to testify, largely on the basis of evidence that she had had a series of consultations with her attorney and family after the judge's statements, and because she was "fully capable of making her own decision." Id. People v. Phillips, 186 Ill. App.3d 668, 542 N.E.2d 814 (1989), another noncapital case involving a drug conviction and seven-year sentence, bears almost no relationship, since there the question involved whether the defendant had been dissuaded from testifying by the trial judge;s insistence that he testify as the first defense witness or not at all. Citing indications that the defendant never intended to testify in any event, the court found no reason to reach the merits of the claim despite the defendant's lack of objection at trial. Whatever the merits of these decisions, they are obviously of little relevance to this case, involving as it does the effect at both the guilt and sentencing phases of a capital trial of coercive statements made to an confused and mentally retarded defendant.

Turning to the statements actually made by Judge Harris in this case, respondents assert that they were less egregious than those condemned in Gunter, Pierce and Cooper because they referred only to the "serious risk" that the jury would hold petitioner's failure to testify against him. Respondents' parsing of the judge's statements fails to take into account the fact that the warnings here were far longer and more repetitive than those in Cooper and Pierce. Whatever the precise wording of

the improper statements, their tenor and import was exactly what led this Court to reverse the convictions in those cases, and any defendant of petitioner's intellectual disabilities would surely have found them just as intimidating and confusing.

Next, respondents insist that the judge's improper statements about the dangers of failing to testify could not have affected petitioner's decision to make an unsworn statement at the sentencing phase of the trial, because the judge's statements referred only to testimony, and not to such statements. Return at 16-17. However clear this distinction might be to a lawyer, there is little chance that petitioner understood the difference. Having been warned by the trial judge that the jury would be likely to penalize him if he failed to tell his side of the story, petitioner was just as likely to remember this warning at the sentencing phase as at the guilt phase of the trial. Indeed, to the extent that petitioner was capable of any coherent decision-making at all, he might well have attributed his conviction to his failure to testify, just as the trial judge had warned him. And under such circumstances, it is entirely possible, and indeed likely, that petitioner interpreted the jury's guilty verdict as an indication that he should have listened to the trial judge's warning at the first stage of the trial, and that he had better break his silence at the sentencing phase. That he ultimately waived his Fifth Amendment privilege by making a unsworn statement rather than by testifying and

undergoing cross-examination scarcely affords a basis for finding this waiver to have been harmless. Estelle v. Smith, 451 U.S. 454 (1981) (Fifth Amendment protections fully applicable to pretrial psychiatric interview which state seeks to introduce at sentencing). Indeed, petitioner's unplanned and rather pathetic statement that, "This crime which I did, I didn't do it" might well have been more damaging in the eyes of the jury than the most searing cross-examination, both for its seeming admission of guilt and its arguable lack of remorse.

II.

For the reasons set forth above, petitioner submits that respondents' arguments justify neither dismissing petitioner's present claim on procedural grounds, nor distinguishing it from the prior decisions of the Court on which he relies. Before concluding, petitioner would observe that respondents' Return contains no hint of what sort of new claim, if any, might warrant relief in a capital case once the initial round of post-conviction litigation has run its course. Since petitioner's case raises this question, he would like to suggest an answer.

It is already well-settled that a second post-conviction relief application may be entertained when the circumstances of the individual case show that the interests of justice so require. Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987), appeal after

remand, Opinion No. 23222 (S.C., May 29, 1990).[3] The emergence of new legal doctrine which calls into question the basic fairness of the proceedings has long been recognized as a valid ground for seeking such collateral relief in a successive post-conviction application. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); McCrae v. State, 510 So.2d 874 (Fla. 1987) (Florida Supreme Court applies Hitchcock v. Dugger, 481 U.S. 393 (1987) retroactively, without regard to alleged procedural defaults, in habeas corpus proceedings in original jurisdiction of supreme court). Petitioner is nevertheless mindful of the state's legitimate interest in ensuring that successive collateral attacks not be used to upset convictions or sentences which are substantially fair and accurate, notwithstanding the emergence of a new ground for legal challenge. Therefore, he submits that in considering

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[3]While respondents make much of the fact that this proceeding is brought under the constitutional remedy of habeas corpus rather than under the Uniform Post-Conviction Procedure Act, S.C. Code §§17-27-10 et seq. (1976), this is a distinction without a difference. Petitioner has selected this vehicle so as to minimize unnecessary delay while placing his legal claim directly before this Court. In any event, any claimed procedural defect which respondents claim to have detected in petitioner's selection of remedies will have been rendered moot by the time this Court hears argument on his petition on Thursday, May 31, by the filing of a new application for post-conviction relief in the Charleston County Court of Common Pleas. For the information of the Court, petitioner will file copies of this post-conviction pleading in this Court as soon as the application is completed. Should the Court determine that the claim raised here requires further factual development, petitioner will be fully prepared to proceed to an immediate evidentiary hearing on the post-conviction relief application.

whether to entertain such challenges, the Court should require a convicted or death-sentenced prisoner to show two things:

First, as is already well-established in this Court's decisions, the prisoner should bear the burden of showing that the newly-asserted ground could not have been asserted earlier, or that his failure to assert it earlier cannot fairly be attributed to him; and,

Second, that in light of all the evidence in the case, there is a reasonable likelihood that if a new trial or sentencing hearing were granted, the outcome would be different.

This second requirement, of course, is already familiar to the Court as the "prejudice prong" required in analyzing ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668 (1984). In the context of second collateral attacks, application of this standard as an additional threshold requirement before the new claim could be considered would have the effect of guaranteeing that such collateral review would be permitted only where the interests of justice would truly be served by such review. In effect, it would rule out all additional review "in those cases where the proof of facts is virtually undebatable and the nature of the wrongful killing is such as to shake the conscience of the community." State v. Adams, 279 S.C. 228, 241, 306 S.E.2d 208 (1983).[4] But in those

[4]Stated differently, this proposed threshold requirement would allow the Court to decline to consider even meritorious legal claims in successive-petition cases where the Court is

rare cases where the evidence is weak and the record as a whole shows that a different verdict would likely be had on retrial, there can be no valid reason for a mechanical refusal to consider meritorious legal claims which the prisoner could not fairly have been expected to have raised earlier.

The Court will note that this proposal involves a substantial new restriction on the availability of successive post-conviction remedies. Its merit is that it allows the Court to do justice in individual cases, while refusing to so much as entertain successive claims in those cases where fundamental justice does not warrant further consideration. And it returns the focus of the inquiry from arcane procedural technicalities to where it belongs: on the basic fairness and accuracy of the conviction or sentence under challenge.[5]

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nonetheless convinced that substantial justice has already been done.

[5]It is especially appropriate that such a test be employed in the context of a habeas corpus proceeding. For despite the welter or procedural and technical objections which respondents have raised, the writ of habeas corpus is intended to cut through procedure to ensure justice. Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370, 374 (1985).

> The writ of habeas corpus is not a static, narrow, formalistic remedy, and its scope has continually developed in order that it constantly protect individuals against the erosion of the right to be free from wrongful restraints on their liberty. It should not be circumscribed by technical considerations; rather, it should be administered with a liberal judicial attitude, and with initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

If such a test were employed here, petitioner would be entitled to review on the merits of his claim, and to relief. Given the severity of petitioner's mental retardation, his undiagnosed and untreated mental illness, and the isolation and extreme poverty in which he was raised, see Appendix B to Petition for Habeas Corpus, Summary of Psychological Evaluation by Dr. David R. Price, it is most unlikely that a properly-informed jury would have sentenced him to death, or that such a jury would sentence him to death now. This is especially true in light of the marginal nature of the state's proof of rape, the sole aggravating factor on which petitioner's death sentence rests.[6] When this case is considered as a whole, it plainly stands outside of that category of crimes and offenders for which the death penalty has generally been reserved in this state. Because no jury has ever had the opportunity to make an informed and full assessment of that basic question, and because intervening decisions of this Court have now made clear that his trial did not satisfy basic constitutional standards, the

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39 CJS Habeas Corpus §6; see also, 39 AmJur2d Habeas Corpus §§4, 11.

[6]Respondents seem to misunderstand petitioner's references to these and other problematic aspects of the record of this troubling case as an effort to reopen the legal claims which they involve. In fact, petitioner lists them not to ask for reconsideration of any of this Court's prior determinations, but simply to underscore that this is a case in which substantial justice has not yet been achieved. What this means is that the granting of relief in this case would not lead to mere delay in the carrying out of a justified and inevitable death sentence, but to the correction of an unreliable sentencing determination.

petition for writ of habeas corpus should be granted.

Respectfully submitted,

JOHN H. BLUME
DAVID I. BRUCK
ARTHUR G. HOWE
GEDNEY M. HOWE, III

By: David I. Bruck
ATTORNEYS FOR PETITIONER

May 30, 1990

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

HORACE BUTLER,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and T. TRAVIS MEDLOCK, Attorney General of South Carolina,

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she personally served a true copy of the Petitioner's Reply in the above captioned matter upon opposing counsel by delivering one (1) copy to the office of Senior Deputy Attorney General Donald J. Zelenka, this 30th day of May, 1990.

C-15

BETINA ENTZMINGER

Sworn to and subscribed before me this 30th day of May, 1990.

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 3/12/2000

APPENDIX D

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
HORACE BUTLER, Applicant v. PARKER D. EVATT, et al., Respondent.	)	90-CP-_____

APPLICATION FOR POST-CONVICTION RELIEF

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ATTORNEYS FOR APPLICANT

STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
HORACE BUTLER, Applicant, v. PARKER D. EVATT, Respondent.	)	90-CP-10-_____ APPLICATION FOR POST-CONVICTION RELIEF

[Note: the following application is set out in the form required by Rule 50 of the Rules of the South Carolina Supreme Court.]

I. PROCEDURAL HISTORY AND OTHER REQUIRED INFORMATION.

1. Place of detention: Edisto Unit, Broad River Correctional Institution, 4460 Broad River Road Columbia, SC 29210.

2. Name and location of Court which imposed sentence: Charleston County Court of General Sessions.

3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 80-GS-10-1431.

4. Sentence of death was imposed on indictment: 80-GS-10-1431.

5. Findings of guilty were made after a plea of not guilty.

6. The applicant did appeal from the judgment of conviction and sentence.

7. (a) The courts to which the applicant appealed:

   i. The South Carolina Supreme Court.
   ii. The United States Supreme Court.

   (b) The result in each court to which the applicant appealed:

   i. Convictions and death sentence affirmed.
   ii. Petition for writ of certiorari denied.

(c) The date of each such result:
i. Convictions and death sentence affirmed on February 22, 1982.
ii. Certiorari was denied by the United States Supreme Court on October 12, 1982.

(d) Citations of any written opinions or orders entered pursuant to such results:

State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, 459 U.S. 932 (1982).

8. Not applicable.

9. See Section III of this application.

10. See Section III of this application.

11. The applicant has previously filed an application for post-conviction relief in this court, as well as a petition for writ of habeas corpus in federal court.

12. (a-e) The previous application for post-conviction relief was denied by the Charleston County Court of Common Pleas on January 28, 1984. Certiorari was granted by the South Carolina Supreme Court on February 19, 1985, and affirmed the denial of post-conviction relief on August 27, 1985. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Certiorari was denied by the United States Supreme Court on January 21, 1986. Butler v. South Carolina, 474 U.S. 1093 (1986).

The petition for writ of habeas corpus was filed in the United States District Court for the District of South Carolina on May 14, 1986. The petition was referred to a United States Magistrate. The Magistrate recommended on March 9, 1987, that respondents' motion for summary judgment be granted. On June 9, 1987, relief was denied by the district court. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court on May 6, 1988. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988). On December 2, 1988, the panel decision of the Court of Appeals for the Fourth Circuit was modified and the petition for rehearing en banc was denied by a six to five vote. Butler v.

Aiken, 864 F.2d 24 (4th Cir. 1988).

On May 1, 1989, certiorari was granted by the United States Supreme Court. After briefing and oral argument the United States Supreme Court affirmed the Fourth Circuit Court of Appeals decision. Butler v. McKellar, ___ U.S. ___, 110 S.Ct. 1212 (1990). On April 23, 1990, rehearing was denied.

13. Yes.

14. (a) Ground 9(a) is being re-raised because facts critical to a proper determination of whether applicant's counsel was constitutionally ineffective were not presented in connection with his first application for post-conviction relief.

(b) Ground 9(a) was originally raised in applicant's first post-conviction application.

15. The other grounds set forth in (9) were not previously presented to any Court, State or Federal, because they were either legally unavailable, only recently available because of newly discovered evidence, or were inadvertently, but excusably, omitted by prior counsel.

16 & 17. The applicant was represented at his arraignment, plea and trial by W. McAlister Hill of Ravenel, South Carolina.

The applicant was represented on appeal to the South Carolina Supreme Court and in his petition to the United States Supreme Court by W. McAlister Hill and David I. Bruck, then of the South Carolina Office of Appellate Defense. In his first application for post-conviction relief and petition for writ of habeas corpus, he was represented by Dale T. Cobb, Jr. of Charleston, South Carolina.

On certiorari to the United States Supreme Court in connection with the denial of his habeas corpus petition, applicant was represented by Dale T. Cobb, David I. Bruck, John H. Blume, and Franklin W. Draper.

18. The applicant is seeking vacation of his convictions and sentence of death.

19. Applicant is not under sentence from any other court.

II. STATEMENT OF RELEVANT FACTS

It can fairly be said, against the backdrop of cases in which the death sentence has been imposed in this state, that the offense for which Horace Butler was convicted and sentenced to death was only marginally a capital case. The South Carolina Supreme Court has stated: "[i]t is our observation that a unanimous jury in South Carolina has ordered the death penalty in only those cases where the proof of facts is virtually undebatable and the nature of the wrongful killing is such as to shake the conscience of the community." State v. Adams, 279 S.C. 228,241, 306 S.E.2d 208, cert. denied, 464 U.S. 1023 (1983). For the reasons that follow, applicant's case does not fall within the Adams criteria.

The state's evidence in aggravation of punishment was weak, and Horace Butler had no prior criminal record involving violence. Thus, considering the appropriateness of the death penalty from the vantage point of the crime-related evidence presented at trial, while this offense may technically have been a capital case, it could easily have been tried noncapitally. Furthermore, as will be set forth in detail in Ground A of this application, the sentencing jury did not know that Horace Butler was mentally retarded, that he was mentally ill, or that he was a product of a background of grinding poverty and extreme deprivation. For all practical purposes, the jury only knew about what Horace Butler did on July 17, 1980--the evening of the offense.

Horace Butler was convicted of murder and sentenced to death

APPENDIX A

[The following excerpt from the trial record of State v. Horace Butler is found at pages 871, line 21 to 877, line 3 of the Transcript of Record. All emphasis is added.]

COURT: Mr. Butler, I want you to stand up, please. Your lawyer tells me, as you just heard him say, he does not intend for you to testify in this case. You understand that?

MR. BUTLER: Yes, sir.

COURT: Do you agree with your lawyer's strategy in not testifying?

MR. BUTLER: Yes, sir.

COURT: You know that the Constitution of the United States and of South Carolina both gives to anyone who is charged with a crime, any crime, the right to be tried by a jury which you have quite properly elected to do, avail yourself of, and to stand that trial without having to get on the witness stand and testify if that defendant doesn't want to do so. You understand that right?

MR. BUTLER: Yes, sir.

COURT: By the same token, you have every right to testify and to tell your side of it, to tell any circumstances which you think would help you. You understand that?

MR. BUTLER: Yes, sir.

COURT: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not testifying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

MR. HILL: He doesn't understand, Your Honor.

COURT: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other "wonder why he didn't testify." I tell you that jurors are only human beings and that

there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

COURT: You are? And you are willing to take that risk by not testifying? Don't misunderstand me, son. I don't mean to be threatening you in any way. I am trying to get some information which is my job to elicit. What I want to do is be sure that you are satisfied with not testifying.

COURT REPORTER: I didn't get his answer.

COURT: I understood him to say yes, sir. I want you to tell me, son, have you talked to your lawyer about the fact that no matter what you say to the jury about what the law is, I cannot erase from their minds the natural tendency of any human being to wonder or wonder why the defendant didn't testify. What I am telling you is that you run some risk by not testifying. Are you aware of that risk?

MR. BUTLER: Yes, sir.

COURT: And you are willing to take that risk in order to avoid going on the witness stand and being cross examined by the solicitor, is that right?

MR. BUTLER: I can't answer that.

COURT: Sir?

MR. HILL: He said he couldn't answer that.

COURT: Well, you are going to have to answer that before we proceed with the trial. I want to know and be sure that he has been thoroughly apprised of what is about to transpire here and he personally agrees with that course of conduct. All right, let's start over again. During lunch time you and your lawyer talked about this case, didn't you, son?

MR. BUTLER: Yes sir.

COURT: And he talked about you not testifying, did he? Tell me what you all talked about at lunch. Wasn't it about your case? Mr. Hill, I am going to ask you to take your client somewhere privately and talk to him so that he can properly answer my questions.

MR. HILL: All right.

COURT: I am sure you have already done so. I am not suggesting that you haven't. Advise him of what I am trying to do. I am not trying to get him to change his mind or do anything, but I am not going to waste three days of my time and yours and these jurors by having him say I don't know. I can't make up my mind or not. He is going to have to tell me something before we proceed with the trial.

MR. HILL: He wants to go in the room with me, Your Honor.

COURT: Certainly. That is what I meant. But you understand what I mean, Mr. Hill.

MR. HILL: Yes, sir.

COURT: I want him to tell me that he has discussed it with you and he agrees not to testify.

(Mr. Hill and Mr. Butler leave the courtroom)

(Mr. Hill and Mr. Butler return to the courtroom)

COURT: Mr. Butler, let me talk with you further, if you will. While ago you heard the lawyer say that is the defendant's case. You heard him say that. That means that you are not going to testify. You understand that?

MR. BUTLER: Yes, sir.

COURT: Means you are not going to come around here and sit down there and tell that jury your side of this controversy. You are not going to get a chance to say "I didn't do it; I wasn't around there" or say anything like that. Do you understand that? You have talked to your lawyer about that procedure, didn't you, about you not testifying?

MR. BUTLER: Yes.

COURT: Before he told me that is the defendant's case, you all had already talked about that, right.

MR. BUTLER: Yes, sir.

COURT: No, do you agree with your lawyer that you ought not to testify in this case?

MR. BUTLER: Yes, sir.

COURT: Do you know that, as I just finished telling you, there is a serious risk involved in that procedure because human beings are naturally going to wonder why he didn't testify. Are you aware of that?

MR. BUTLER: Yes, sir. I ain't guilty.

COURT: I am not arguing with you about that, son. It is just like, for instance, if a couple of fellows stand around and one of them accuses the other one of doing something and that one never says a word, makes you wonder, doesn't it, wonder why he didn't deny that he did it. It would raise a question in your mind, wouldn't it?

MR. BUTLER: Say that over again.

COURT: Suppose you and I are out here, not in court, anywhere else, but I walk up to you and say, "Dad gum it, Horace, you stole my wallet," and you don't say a word. I say, "Dad gum it, I say you stole my wallet," and you don't say a word. A fellow standing over here and listening to us is going to think you stole my wallet, isn't he, because he will think if Horace didn't do it, he
is going to say I didn't do it. See what I mean?

MR. BUTLER: Yes, sir.

COURT: All right. That risk is what you are taking with this jury, even though I tell them they can't do that. They might do it anyhow and I have got no way of controlling them, once they go in the jury room. Do you understand?

MR. BUTLER: Yes, sir.

COURT: And are you now being advised of that risk, satisfied with the position which your lawyer and you have agreed on not to testify in this case?

MR. BUTLER: Yes, sir.

COURT: All right. Thank you. Be seated.

APPENDIX B:

SUMMARY OF PSYCHOLOGICAL EVALUATION BY DR. DAVID R. PRICE

Behavior Resources Inc.

MEMORANDUM

TO: Scharlette Holdman, Investigator
South Carolina Death Penalty Resource Center

FROM: David R. Price, Ph.D.

RE: Horace Butler

DATE: May 2, 1990

1. Horace has a Full Scale I.Q. of 61, a Verbal I.Q. of 65, and a Performance I.Q. of 61.

2. If you look at his individual intellectual cognitive scales, you will find that the following scales are in the bottom one percentile of the population. That means if you lined up 100 people, 99 of them would score higher in these cognitive skills than Horace. These deficits include his fund of general knowledge; his knowledge of word meanings and ability to express himself verbally; common sense reasoning and ability to exercise social judgment in practical situations; the ability to see relationships among objects and to abstract; the ability to evaluate social relevance in pictorial situations and planning ability; ability to handle spatial relationships; and his part to whole perception.

3. Analysis of his intellectual ability would suggest that his eventual educational potential would only be between the second and fourth grade. His eventual vocational potential would be one that could only perform routine tasks under supervised labor. His eventual marital potential would be poor to moderate. His eventual independence potential would be little to moderate.

4. Horace's performance on the Wide Range Achievement Test - Revised would indicate that his reading ability is at the sixth percentile with less than a third grade equivalency. His spelling ability is at the fourth percentile with a grade equivalency of about the fifth grade. His arithmetic ability is at the .2 percentile with less than a third grade equivalency. This is consistent with his academic achievement and intellectual potential. This indicates he has difficulty reading and comprehending written statements and participating with them.

5. Horace's performance on the Denman Neuropsychology Memory Scale

resulted in memory quotients of 51 for Verbal Memory, 53 for Nonverbal Memory, and 46 for Full Scale Memory. These are all at the first percentile or less. These are in the severely deficient range and are lower than one would expect for his I.Q. This indicates that he is not an adequate historian and not able to recall facts about his past and has difficulty learning new material, which is consistent with his history.

6. Consistent with his mental retardation, he has no driver's license. He was dependent upon his parents to sleep with him to a late age because he is afraid of the dark, and he is not dependable in social situations.

7. Horace started the first grade at the age of 12 and withdrew at the age of 16 when he completed the third grade.

8. Marginal intellectual functioning would further deteriorate by the conditions that had been diagnosed through probate while incarcerated. This includes Chronic Schizophrenia, Psychosis, and Depression.

9. This man's intellectual deficits would make him eligible for aid from Social Security, Department of Mental Retardation, or Department of Vocational Rehabilitation.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

C. Anthony Harris, Judge

HORACE BUTLER,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and T. TRAVIS MEDLOCK, Attorney General of South Carolina,

Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Habeas Corpus in the above referenced case has been served upon opposing counsel by mailing one (1) copy in an envelope properly addressed with postage prepaid this 9th day of May, 1990.

David I. Bruck

DAVID I. BRUCK

SUBSCRIBED AND SWORN to before me
this 9th day of May, 1990.

Catherine A. Gulley (L.S.)
Notary Public for South Carolina

My Commission Expires: 6/10/91.

in the Charleston County Court of General Sessions for the July 17, 1980, murder of Pamela Lane. Ms. Lane was an 18-year-old employee of Dodge's convenience store near Ravenel, South Carolina. She left Dodge's Store sometime after 11:00 p.m. on July 17. She was riding alone on a moped and was en route to her sister's house where she was living.[1] Her fully clothed body was found the next day near Horse Neck Bridge in Hollywood, South Carolina. She had been shot in the chest one time with a .22 caliber pistol. The moped she was riding was discovered the next day several miles from where Ms. Lane's body was found.

Horace Butler was arrested on August 30, 1980 on an unrelated assault charge, which was later dismissed. At the time of his arrest on the assault charge, Horace Butler was already the primary suspect in the murder of Ms. Lane. In fact, he was arrested on the assault charge in order that the police could hold him while they continued their investigation, and to make it easier to interrogate him. However, Mr. Butler was not informed at the time of his arrest that he was a suspect in the murder.

On August 31, 1980, Mr. Butler retained W. McAlister Hill of Ravenel, South Carolina, to represent him in connection with the assault charge. Mr. Hill appeared with Mr. Butler at a bond

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[1]The evidence at trial revealed that Ms. Lane moved to South Carolina in January of 1980 from Michigan to live with her sister, Susan Lane Lyngvar, who resided in Hollywood with her husband. Pamela Lane began working at Dodge's store on July 16. She had never ridden the moped before. Her sister and brother-in-law had purchased it for her that day, and her sister brought it to her at Dodge's late in the afternoon on July 17th.

hearing late in the evening on the 31st. Neither Mr. Butler nor Hill were informed that Mr. Butler was a suspect in the Lane murder. Shortly after Mr. Hill left the jail that evening, Lt. Eugene Frazier, the officer in charge of the murder investigation, had Mr. Butler brought to him at Charleston County Police Headquarters for questioning about the Lane murder. The interrogation commenced around midnight and eventually produced two statements. The first statement, which placed the blame for the homicide on a friend of Mr. Butler's, Larry White, was obtained around 2:45 a.m. A second and more incriminating statement, in which Mr. Butler allegedly admitted having consensual sexual relations with Ms. Lane and then murdering her after she indicated she was going to "cry rape," was obtained at approximately 5:45 a.m.[2] Mr. Butler was returned to his cell at approximately 10:00 a.m. the next day.[3] Horace Butler's statements were not tape-recorded. Lt. Frazier testified at trial that he did not tape-record statements at the instruction of the Ninth Circuit

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[2]These oral statements were reduced to writing and signed by Horace Butler. The statements say that Horace Butler is 23 years old and has a seventh grade education. Mr. Butler, however, was only 21 years old and never completed the fourth grade.

[3]In Butler v. McKellar, ____ U.S. ____, 110 S.Ct. 1212 (1990), the United States Supreme Court, as had the United States Court of Appeals for the Fourth Circuit in its en banc consideration of applicant's case, agreed that the statements obtained from Mr. Butler contravened the Fifth Amendment principles established in Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093 (1988). However, a five-justice majority determined that Roberson was not applicable to Mr. Butler's case because it was decided after his conviction became final on direct review.

Solicitor's office.

Mr. Hill served as Mr. Butler's counsel in connection with the murder charge. This was Mr. Hill's first murder trial, and he had limited felony experience.[4] No other attorneys assisted or participated in Hill's representation of Mr. Butler. The case was originally placed on the trial roster for the first week of December of 1980 as a non-capital offense. However, the state declined to call the case and filed a notice of intent to seek the death penalty. The case was rescheduled for January of 1981, and commenced on January 19 before the Honorable Anthony C. Harris and a jury.

Kidnapping and rape were the statutory aggravating circumstance relied upon by the state. Immediately prior to trial, however, the state moved, pursuant to then-Circuit Rule 95, that the charges of kidnapping and rape be taken off the active trial roster until the murder case was disposed of. This sequence of events suggests that the state recognized that its evidence regarding kidnapping and rape was weak, and thus decided not to expose those charges to the jury at the guilt-or-innocence phase of applicant's trial.

The state's evidence of guilt at trial consisted largely of

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[4]Mr. Hill was admitted to the bar in 1974. He testified at the original post-conviction relief hearing that he had been involved in seven or eight felony cases prior to representing Mr. Butler, only two of which went to trial. Thus he would not have qualified for appointment as Mr. Butler's lead counsel pursuant to the criteria set forth in S.C. Code §16-3-26(B). See also State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988).

the testimony of Larry White[5] and the statements of Horace Butler. Larry White was charged as an accessory after the fact of murder. He testified at trial that he had been promised nothing in exchange for his testimony. However, the charges against him were later dismissed.

There were several unusual aspects to the state's evidence. For example, while the state maintained that Horace Butler perpetrated this crime alone, a Negroid pubic hair which definitely did not come from Horace Butler was found on the victim's clothes. The F.B.I. agent expert who "absolutely" excluded Butler as the source of this hair could not say that it did not belong to Larry White.[6] Additionally, the semen found in the victim's vagina was

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[5]Larry White testified that Horace Butler came and picked him up at a lounge in the Adams Runs section called "the Whiz" late in the evening on July 17th. According to White, Horace told him that he needed White to help him do something. White left with Horace in Horace's car. White maintained that Horace took him to the moped and asked him to help him dispose of it. White helped Horace push the moped in the marsh. White testified that it was only after the moped had been disposed of did he learn from Horace that Pamela Lane was dead. White testified that Horace told him he had accidentally hit Ms. Lane while driving down the road. He stopped, and after he determined that she was probably not going to survive, he shot her.

It is important to note that Horace would not have needed White's help to dispose of the Moped. Ms. Lane's sister testified that she could easily lift the moped by herself. In fact, she had loaded it into her car by herself and brought it to Pamela on July 17th.

[6]Additionally, evidence presented at the original post-conviction relief hearing revealed that Larry White, not Horace Butler, was known to carry a .22 caliber pistol, which was the type of weapon used in the murder of Pamela Lane. Furthermore, Ms. Lane's shoes were found near a bar called "the Whiz." Larry White worked at "the Whiz."

found to contain Type A blood factors. Horace Butler had Type O blood and was a non-secretor. The victim had Type A blood. Thus the state postulated that the Type A blood factor in the semen came from Ms. Lane. However, for unknown reasons, the state did not test Ms. Lane to determine whether she was a secretor. If she was not a secretor, the semen found in the victim's body would have had to have come from a male with Type A blood, and could not have come from Horace Butler. Similarly, the pathologist testified that the autopsy did not reveal any evidence of forcible sexual relations. While he maintained that this was not absolutely inconsistent with rape, he did state that in his experience there were usually signs of vaginal tearing or abrasions in cases involving forced sexual activity.[7] Furthermore, paint scrapings taken from the new moped did not come from Horace Butler's automobile.

When applicant's trial counsel announced that the defense intended to rest without calling Mr. Butler to testify on his own behalf, the trial judge initiated a lengthy monologue in which he warned petitioner no fewer than seven separate times that the jury would likely hold his failure to testify against him, regardless of the instructions of the court. Tr. 871-77.[8] Throughout most

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[7]He stated: There was "no evidence of trauma normally found in forced sexual intercourse."

[8]These remarks are indistinguishable from those condemned by the South Carolina Supreme Court in State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986); State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986); and, State v. Gunter, 286 S.C 556, 335 S.E.2d 542 (1985). Applicant has filed a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court

of this discussion, petitioner was confused and bewildered: other than "Yes, sir," all of his responses were to the effect that he did not understand, tr. 872; tr. 873, that he could not answer, tr. 873, that he wanted to go into a room to talk to his lawyer, tr. 874, and that he wanted the judge to repeat his questions. Tr. 876. Mr. Hill also informed the judge that Mr. Butler did not understand what the judge was saying. Tr. 872. Judge Harris at one point asked Mr. Hill to take Mr. Butler outside and try to explain it to him. Tr. 874.

Horace Butler was convicted of Pamela Lane's murder on January 24, 1981. At the conclusion of the guilt-phase of the trial, Judge Harris determined that the state did not have sufficient evidence to submit the statutory aggravating circumstance of kidnapping to the jury. Tr. 972. Judge Harris also stated that he extremely skeptical as to the sufficiency of the evidence of rape. Id.[9] However, after deliberating overnight, he ultimately determined that he would allow the rape aggravating circumstance to be submitted to the jury.

The state presented no additional evidence in aggravation of

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raising this claim, which has never been specifically ruled upon by any court. The petition for writ of habeas corpus is set forth as an appendix to this application.

[9]Off the record, Judge Harris was apparently even more skeptical of the state's evidence of rape. Mr. Hill testified at the post-conviction relief hearing that Judge Harris told Solicitor Condon and Assistant Solicitor Schmutz that the evidence of rape was insufficient and that they "knew damn well" that the federal courts would vacate the death sentence. PCR tr. 322.

punishment during its sentencing phase case-in-chief. The mitigation case presented by Mr. Hill lasted approximately 10 minutes, and consisted of a stipulation that the victim had attempted suicide on two occasions, and the testimony of a school principal that Horace Butler dropped out of school at age 16 in the fourth grade.[10] As will be set forth subsequently in this application, the jury was not apprised of the fact that Horace Butler was mentally retarded with a full scale I.Q of 61, and a mental age of less than a nine-year-old child. The sentencing jury was also not informed that Horace Butler is brain damaged and mentally ill, or that he was raised in conditions of abject poverty and deprivation. Essentially, the jury's sentencing decision was made in a vacuum.[11]

After argument and instructions, the jury deliberated for approximately three hours before returning with a verdict of death.

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[10]Counsel attempted, in various ways, to introduce other evidence regarding Pamela Lane's troubled past. For example, counsel expressed his desire to introduce evidence that the victim had been involved in an auto accident in which she killed one pedestrian and injured several others shortly before her death. Ms. Lane was charged with reckless homicide and, according to her brother-in-law, received several threatening and anonymous telephone calls as a result of her involvement in the accident. He also wanted to introduce other evidence that the victim dated black men. The trial judge excluded this evidence. While the reason for the exclusion of the evidence is somewhat unclear, it appears that the judge both believed the evidence was irrelevant and that regardless of its relevancy, the evidence proffered by Mr. Hill was incomplete.

[11]As will be set forth in more detail in section A of this application, part of the reason for this dearth of mitigating information is that trial counsel never had Horace Butler evaluated by any type of mental health professional.

After accepting the sentence of death, the trial judge made the following comment to the jury:

> Your responsibility to the state and to the defendant is concluded when you arrive at a verdict. As I say, it is a proper one under the evidence. Another verdict would have been proper, depending upon your views of the facts and applying the law as I gave it to you.

Tr. 1037 (emphasis added). Thus, the trial judge's actions and comments throughout Horace Butler's trial, strongly suggest that he also believed this to be a case in which a life sentence would have been entirely appropriate.

III. GROUNDS FOR RELIEF WITH SUPPORTING FACTS AND ARGUMENT.

(9)A. Horace Butler was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the South Carolina Constitution.

1. Introduction.

The jury that sentenced Horace Butler to death knew virtually nothing about him except what evidence the state presented regarding the events of July 17, 1980. The only evidence presented in mitigation of punishment, aside from a stipulation regarding the victim's two prior suicide attempts, came from a principal at the school Horace attended for several years. The principal testified that Horace enrolled in the first grade at the age of twelve and dropped out at age 16 in the fourth grade. It is clear from his testimony that he had little or no personal knowledge of Horace Butler. The defense presentation in mitigation of punishment lasted less than ten minutes.

Thus the jury that sentenced Horace Butler to death did not know that Horace Butler is mentally retarded with a full scale I.Q. of 61, or that he has the mental age of an eight to nine year old child. It was not apprised of the serious and diverse effects which mental retardation has on an individual's personal blameworthiness and moral culpability. The jury did not know that Horace Butler is brain damaged and has an organic brain condition known clinically as dementia which seriously impairs his ability to accurately recall and process information. The jury did not know that he was mentally ill and, for example, that even as a twenty-one year old he slept in his parent's room because he was afraid of the dark. Nor was the sentencer made aware of the facts and details relating to the grinding and oppressive poverty in which Horace Butler was raised. The jury did not know because trial counsel did not take the most rudimentary of steps in a capital case. He never asked any mental health professional of any kind to evaluate Horace. Thus compelling and overwhelming evidence in mitigation of punishment went undiscovered and unpresented. As a result of the jury's failure to know these critical facts, Horace Butler's death sentence is wholly unreliable and must be set aside.

2. The Relevant Legal Principles.

The United States and South Carolina Constitutions guarantee a criminal defendant the right to be represented by counsel. This right is the most basic component of our criminal justice system. See U.S. Const. amend. VI; South Carolina Constitution, Article I,

Section 14 (1977). The decisions of the United States Supreme Court and of this Court have repeatedly emphasized the "fundamental" role of counsel to a fair trial. See, e.g., United States v. Cronic, 466 U.S. 648 (1984); Argersinger v. Hamlin, 407 U.S. 24, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), see also Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988); Davenport v. State, ___ S.C. ___, 389 S.E.2d 649 (1990). The basic theme of these cases is that counsel is the means through which other rights of the person on trial are secured. Cronic, 466 U.S. at 653; see also United States v. Ash, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). It is for this reason that our system of criminal justice presumes that counsel will act as an accused's forceful and undivided advocate. Anders v. California, 386 U.S. 738 (1967). The right to counsel, of course, incorporates the right to the effective assistance of counsel. Strickland v. Washington, 446 U.S. 668 (1984).[12]

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[12]Respondents will inevitably argue that the question of the adequacy of trial counsel's representation has already been resolved by the South Carolina Supreme Court in Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986). In light of the new facts, fully presented for the first time in connection with this application, the interests of justice require that this ground for relief be revisited.

Furthermore, since this claim was last addressed by the South Carolina Supreme Court, there have been a series of legal developments relevant to a proper resolution of this claim. First, and most significant, is the recognition both in this state and across the country of the significance of mental retardation as a mitigating factor in a capital case. See, e.g., State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988); Penry v. Lynaugh, ___ U.S.

___, 109 S.Ct. 2934 (1989). The power of mental retardation as a reason that a capital defendant should not be sentenced to death is reflected not only in judicial decisions but in a number of recent legislative enactments. For example, Georgia, Illinois, Kentucky and Maryland, all have passed statutes in the last two years prohibiting the execution of persons with mental retardation. A similar bill is currently pending before the South Carolina General Assembly and has strong bi-partisan support. The federal death penalty statute, enacted last year, also prohibits the death penalty from being imposed upon mentally retarded persons. This provision of the federal death penalty bill was championed on the floor of the House of Representatives by Representative Arthur Ravenel (R-SC). In legislation recently passed by the Senate expanding the scope of the federal death penalty, the ban against executing mentally retarded persons was retained by a large bi-partisan margin.

These decisions and legislation, in turn, reflect a consensus among the people of this country that mentally retarded persons should not be sentenced to death. For example, a poll taken in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded. Austin American Statesman, November 15, 1988, p. B3. A Florida poll found 71% of those surveyed were opposed to the execution of the mentally retarded capital defendants, while only 12% were in favor. Cambridge Survey Research, Inc., Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey 7, 61 (1986). A Georgia poll found 66% of those polled opposed to the death penalty for the retarded, 17% in favor, with 16% responding that it depended how retarded the person is. Thompson, Georgians Oppose Death Penalty Involving Retarded, Poll Shows, Atlanta Constitution January 7, 1987 at 10-A. Similarly, a majority of the people in South Carolina are categorically opposed to the execution of mentally retarded persons. O'Shea, South Carolinians Support Death Penalty, Telephone Poll Finds, The State, August 29, 1987, at 8-D.

Finally, since petitioner's case was lost before the state courts, the South Carolina Supreme Court has demonstrated that it will vigorously guard a defendant's right to the effective assistance of counsel. In the last few years, for example, the Court has found numerous types of errors by defense counsel much less egregious than counsel's omissions in this case to constitute ineffective assistance of counsel. See, e.g., Carter v. State, No. 23222 (S.C. Sup Ct. filed May 29, 1990); Davenport v. State, ___ S.C. ___, 389 S.E.2d 649 (1990); High v. State, ___ S.C. ___, 386 S.E.2d 463 (1989); Grier v. State, 299 S.C. 321, 384 S.E.2d 722 (1989); Mitchell v. State, 298 S.C. 186, 379 S.E.2d. 123 (1989); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Frett v.

A Sixth Amendment claim of ineffective assistance of counsel must be resolved by examining the facts of the case in light of the principles enunciated by the Supreme Court in Strickland v. Washington, 466 U.S. 688 (1984). See Cherry v. State, ___ S.C. ___, 386 S.E.2d 624 (1989); High v. State, ___ S.C. ___, 386 S.E.2d 463 (1989). In Strickland, the United States Supreme Court stated that counsel was constitutionally ineffective if counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. Id. at 685. That test is twofold: was counsel's performance in fact deficient; and, if so, was this prejudicial to the defense. Id. at 668; see also Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); Frett v. State, 298 S.C. 54, 378 S.E.2d 349 (1988); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987).

In order to make the first determination, the proper inquiry is whether counsel's conduct fell below an objective standard of reasonableness. Strickland, 466 U.S. at 694. In other words, a defendant challenging the effectiveness of trial counsel must show that the particular acts of counsel were outside the "wide range of professionally competent assistance." Id. In order to satisfy the prejudice requirement, the South Carolina Supreme Court has

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State, 298 S.C. 54, 378 S.E.2d 249 (1988); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (1988); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987).

Therefore, for all these reasons, this claim should be reviewed again in the interests of justice and basic fairness.

interpreted Strickland to require a demonstration "that but for trial counsel's ineffectiveness, a defendant's trial, but not necessarily its outcome, would have been altered in a way helpful to him." Frett v. State, 298 S.C. at 57; 378 S.E.2d at 251.

3. Trial counsel failed to adequately investigate the presence of mitigating circumstances and failed to have an independent psychological evaluation performed even though there was evidence indicating that Horace Butler was mentally retarded, brain damaged and mentally ill at the time of the offense.

a. Counsel's Failure To Make Any Investigation Or To Present Any Mitigating Evidence of Mental Retardation, Brain Damage, Mental Illness, or the Poverty Which The Applicant Was Raised In Despite The Fact that Substantial And Compelling Mitigating Evidence Was Available Undermines Confidence In Applicant's Sentence Of Death.

i) The Significance of Mitigating Evidence.

Trial counsel's role in a capital sentencing proceeding is comparable to counsel's role at trial, i.e., to ensure that the adversarial process works to produce a just result. Strickland v. Washington, supra. One of an attorney's principal duties in a capital case is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 668; see also Darden v. Wainwright, 478 U.S. 1036 (1986) (counsel not ineffective where he engaged in extensive pre-trial preparation and investigation for the penalty phase of defendant's trial). In a capital case, investigation of, preparation for and presentation of the mitigation case at the penalty phase is in many cases a much more critical task than is preparing for the guilt-or-innocence phase.

Guilt is frequently a foregone conclusion. Whether the accused lives or dies, however, is not.

The United States Supreme Court's decisions have stressed the paramount importance of providing the sentencer with the fullest information possible concerning the defendant's life and characteristics. Lockett v. Ohio, 438 U.S. 586 (1978); see also Jurek v. Texas, 428 U.S. 262, 276 (1976)(sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The reasoning behind this Eighth Amendment principle is self-evident. An individualized decision is essential in capital cases in order to insure that each defendant is treated "with that degree of respect due the uniqueness of the individual." Id. at 605. In a capital sentencing proceeding before a jury, "the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" Turner v. Murray, 476 U.S. 28 (1986) (quoting Caldwell v. Mississippi, 472 U.S. 320 (1985)). It is essential, therefore, that the sentencer consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The sentencing body's failure to consider mitigating evidence creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. Id.; see also Skipper v. South Carolina, 476 U.S. 1 (1986) (State's exclusion of evidence

regarding adjustment to prison violated Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104 (1982) (sentencers' failure to consider evidence of turbulent family history violated Eighth Amendment).

Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion).

In Tison v. Arizona, 481 U.S. ___, 107 S.Ct. 1676 (1987), the Court stated that a "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." 107 S.Ct. at 1687. The Court has continually recognized the importance of the defendant's mental state when determining the severity of the punishment. See, e.g., Enmund v. Florida, 458 U.S. 782 (1982); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). "Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," California v. Brown, 479 U.S. 538, 542 (1987) (O'Connor, J., concurring), evidence of a defendant's

mental retardation and mental illness is an important and relevant mitigating circumstance which must be adequately explored by defense counsel. This emphasis is also reflected in the South Carolina death penalty statute: three mitigating circumstances have to do with the mental state of the defendant.[13]

In recognition of these principles, and against the backdrop of the Sixth Amendment guarantee of the effective assistance of counsel, courts have carefully scrutinized trial counsel's investigation, development and presentation of mitigating evidence in capital cases. For example, in Curry v. Zant, ___ Ga. ___, 371 S.E.2d 647 (1988), The Georgia Supreme Court determined that trial counsel's failure to obtain an independent psychiatric evaluation of his client constituted ineffective assistance of counsel. At trial, Curry pled guilty to capital murder and was sentenced to death. Two psychologists testified at Curry's state habeas evidentiary hearing that he did not have the ability to waive his constitutional rights (thus making the plea unacceptable), and that he was either incapable of distinguishing right from wrong or incapable of controlling the impulse to commit wrongful acts. The court recognized that trial counsel was personally dedicated to Curry, but nevertheless determined that the failure to meaningfully explore expert mental health assistance was unacceptable. The court stated:

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[13]See S.C. Code §§16-3-20(C)(b)(2), (C)(b)(6), and (C)(b)(7).

> Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the plea of guilty and the sentence of death must be set aside.

Id., 271 S.E.2d at 649; see also Wilson v. State, 771 P.2d 583 (Nev. 1989).

Similarly in Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988), a panel of the United States Court of Appeals for the Eleventh Circuit found trial counsel to be constitutionally ineffective for failing to investigate, present, and argue to the jury at the sentencing phase evidence of defendant's mental history and condition. Although counsel had learned from the defendant's sister that the defendant had spent a brief time in a mental hospital four to six months before the offense occurred, counsel failed to make any additional inquiries after a state psychiatrist filed a report indicating that the defendant was not mentally ill. The court of appeals concluded:

> Although trial counsel was aware well in advance of trial that appellant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely ignored the possible ramifications of those facts as regards the sentencing proceeding. This omission denied appellant reasonably competent representation at the penalty phase.

Id. at 653; see also Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) (failure to conduct an investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of

death penalty case was ineffective assistance of counsel); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988) (trial counsel ineffective for failing to investigate a capital defendant's mental condition for the purposes of presenting mitigating evidence in the sentencing phase of defendant's trial).

ii) The Reasons for Counsel's Omissions.

Horace Butler's retained trial counsel, W. McAlister Hill, failed to have any mental health evaluation of any kind conducted in this case. He testified at the post-conviction relief hearing that he thought about having Horace Butler evaluated but decided against it. PCR tr. 342. He never gave any arguably legitimate strategic reason for his omission. Counsel's conduct is all the more puzzling in light of the facts known to him. For example, counsel knew that Horace began the first grade at the age of twelve and dropped out of school at age sixteen without completing the Fourth Grade.[14] He also knew that Horace was illiterate. Thus the necessity of a mental health evaluation should have been obvious to counsel.[15] This, of course, is especially so in a capital case

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[14]Mr. Hill also testified at the post-conviction relief hearing that he didn't think Horace completely understood what transpired at his trial and that he didn't know what steps to take to make him understand. PCR tr 365. Some of Horace's confusion is evident on the face of the trial record. See, e.g., Tr. 872.

[15]Counsel's conduct may have been subconsciously influenced by views regarding black persons which are apparent from the record. At one point in a pre-trial motions hearing he stated:

> But Horace Butler lives from day to day, Your Honor, and you could tell by the questions you asked, he didn't understand. You can imagine the problem I am having and

where evidence regarding a client's mental condition may be dispositive of the jury's life/death decision.[16]

Counsel's testimony at the post-conviction relief hearing reveals that he did not understand either the significance or the procedure for obtaining a mental health evaluation. When asked by the Attorney General whether he considered developing psychiatric or psychological testimony concerning Horace Butler's mental state, Mr. Hill testified that "he knew how to do it," and then explained:

> What you do, you file a petition for them to be declared non compis mentis, go over before Judge Fielding, the Therapeutic Division of Probate Court -- be declared non compis mentis, and then you have your examiner.

> I live out in that section. I have been knowing him all my life. I have been conversing with black people and I don't mean that in racial slang. I know them. I grew up with them. I played with them. I understand them as much as most people can.

Tr. 116 (emphasis added). Similarly, at one point when he was questioning the pathologist about the fact that there was no evidence of trauma suggesting that Ms. Lane was raped he stated:

> Now, if a woman were going to be raped, do you think there would be a secretion which would make penetration easier or do you think that, now bear in mind that you have a big black twenty three year old buck and a eighteen year old girl, don't you think that if there were a rape there would be tearing of the tissues.

Transcript of interview with Dr. R. M. Brissie (emphasis added). This transcript is included in the appendix to the application for post-conviction relief as appendix 17.

[16]Mr. Hill was retained and had no co-counsel. This was his first capital case. In fact, it was Mr. Hill's first murder case. According to the testimony presented at the post-conviction relief hearing, a number of attorneys offered Hill their assistance, but he rebuffed their offers.

PCR tr. 318-19.[17]

Of course, this is not and never has been the procedure for having an evaluation performed in a capital case, or any criminal case for that matter. More fundamentally, however, counsel's response indicates a basic lack of understanding of the concept of mitigation and the importance of developing and presenting mitigating circumstances in a capital case.[18] The results were tragic. The defense case at the penalty phase of applicant's trial lasted approximately ten minutes. However, had counsel conducted a reasonable investigation abundant mitigating evidence would have been discovered.

b. The available mitigating evidence.

i) Evidence Regarding Mental Retardation.

Horace Butler has a full scale of I.Q. of 61 and the mental age of an eight to nine year old child. His mental retardation affects virtually every aspect of his life, and dramatically affects his moral culpability for the offense for which he was convicted and sentenced to death. In connection with this litigation, Mr. Butler has been evaluated by a team of competent mental health professionals. Similar professionals were readily

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[17]The transcript of the initial post-conviction relief hearing is included in the appendix to this application as appendix 21.

[18]For example, at another point in his testimony Mr. Hill testified that he did not present certain mitigating evidence because the state has the right to present mitigating evidence as well. PCR tr. 318.

available at the time of Horace Butler's trial had counsel only made the effort to consult them.

David Price, a clinical psychologist in Greenville, South Carolina, has administered a battery of psychological and neuropsychological tests. Among the tests was the Wechsler Adult Intelligence Scale Revised, the standard instrument used for determining an individual's basic intelligence level, i.e., his I.Q. Dr. Price determined that Horace Butler has a full scale I.Q. of 61, which clearly places him well within the mentally retarded range. In his report, included in the appendix to this application as appendix 3, he describes the significance of Horace's I.Q. for his everyday functioning:

> According to DSM-III-R, people with Horace Butler's level of mental retardation need guidance and assistance when under "unusual social or economic stress." DSM-III-R feels that this range of Mental Retardation comprises approximately "one percent of the population." DSM-III-R states that one of the essential features of Mental Retardation in one's significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning with onset before age 18. DSM-III-R states that, "Adaptive functioning refers to the person's effectiveness in areas such as social skills, communication, and daily living skills," or "How well the person meets the standards of personal independence and social responsibility expected of his or her own age by his or her own cultural group. Adaptive functioning in people with Mental Retardation is influenced by personality characteristics, motivation, education, and social and vocational opportunities." According to DSM-III-R, "Known etiological factors for Mental Retardation include heredity factors, early alteration or embryonic development such as prenatal damage due to toxins (e.g., maternal alcohol consumption), infections, pregnancy and perinatal problems such as fetal malnutrition, prematurity and trauma, and physical disorders acquired in childhood such as infections, traumas and lead poisoning. Environmental

> influences and mental disorders, such as deprivation of nurturance and are social, linguistic, and/or other stimulation, and complications of severe mental disorders can be a factor." DSM-III-R also indicates that "behavioral symptoms commonly seen in the Mental Retardation include passivity, dependency, low self-esteem low frustration tolerance, aggressiveness, and poor impulse control." It goes on to say that, "the prevalence of other mental disorders is three or four times greater with people with Mental Retardation than in the general population." DSM-III-R also indicates that, "people with Mental Retardation are particularly vulnerable to exploitation by others, such as being physically or sexually abused or being denied rights or opportunities." My testing, clinical interview and record review revealed all these characteristics of persons with mental retardation to be present in Mr. Butler.

Report of Dr. Price; Appendix 3. Dr. Alec Whyte, a psychiatrist in Washington, D.C. who evaluated applicant, believes that although Horace's I.Q. places him within the mildly retarded range, considering his adaptive deficits he is better classified as moderately mentally retarded. He does so for the following reasons:

> While Horace Butler's significantly subaverage intellectual functioning has been clearly established by appropriate tests (cfr. Dr. Price's report), the full measure of his adaptive deficiency has never been assessed in that he has always functioned under close, sustaining supervision, first the family, then the Department of Corrections. Without such support, Horace Butler could not begin to meet the minimal standards of personal independence and social responsibility expected of his age.

Report of Dr. Alec Whyte.[19]

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[19]He describes the symptoms of moderate mental retardation as follows:

> Those with this level of Mental Retardation during the

Dr. David Bachman, a neurologist at the Medical University of South Carolina who also examined Horace concurs:

> Mr. Butler suffers from mental retardation of mild to moderate severity. This diagnosis is based on the history of the patient's poor school performance (16 years old in the 4th grade), Dr. Price's psychological testing and the mental status examination performed as part of this examination. Mr. Butler also has other physical features sometimes associated with mental retardation including: microcephalic appearing head, coarse facial features, large and widely spaced teeth, mirror movements, short neck with fatty hump and spooning posture of the outstretched hands.

Report of Dr. David Bachman; Appendix 2.

ii) Evidence Regarding Brain Damage.

Horace Butler also has an organic brain syndrome in addition to his mental retardation. Dr. Price administered a full neuropsychological battery to determine the presence of any brain dysfunction. He concluded:

> Mr. Butler was administered the Luria-Nebraska Neuropsychology Battery on May 9, 1990. On the Luria-

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> preschool period can talk or learn to communicate, but they have only poor awareness of social conventions. They may profit from vocational training and can take care of themselves with moderate supervision. During the school-age period they can profit from training in social and occupational skills, but are unlikely to progress beyond the second grade level in academic subjects. They may learn to travel alone in familiar places. During their adult years they may be able to contribute to their own support by performing unskilled or semiskilled work under close supervision in sheltered workshops. They need supervision when under mild social or economic stress.

Report of Dr. Whyte.

> Nebraska Neuropsychological Battery, he scored very significantly in the Pathognomonic Range, indicating the presence of significant cortical impairment. On the Impairment Index, he was also in the Significant range. There was little difference for lateralization purposes between left and right hemispheres. This suggested a more diffuse global cerebral impairment consistent with retardation and consistent with an origin malnutrition; lead poisoning; and things of that nature. He showed significant impairment in his motor functions, his ability to differentiate among rhythms, his expressive speech, his expressive writing, and his intellectual scale. His overall performance was more consistent with chronic organic dysfunction.

Report of David Price. His conclusions are fully supported by the findings of Dr. Bachman and Dr. Whyte.

iii) Evidence Regarding Mental Illness.

All three mental health professionals who evaluated Horace Butler found him to be mentally ill as well as mentally retarded. They agreed that he is schizophrenic. Dr. Price noted:

> The presence of Schizophrenia further aggravates Horace's Dementia and Retardation. It is also aggravated by the stressful conditions previously commented on. The Schizophrenia involves multiple psychological processes. This can include the presence of delusions, auditory, visual and olfactory hallucinations, and a disturbance in thought form, disturbances in speech and perception, flat and/or inappropriate affect, the loss of self-direction, a disturbance in self-initiated goal directed activity, an ambivalence toward alternative courses of actions, and impaired interpersonal relationships. Disturbances in psychomotor activity may also occur. Onset for this disorder is usually early adulthood and is consistent with Horace's history. This disorder causes impairment in daily functioning, social relationships and self care, as has been evidenced with Horace. This disorder coupled with the passiveness, submissiveness, withdrawal, low assertiveness and introversion, as indicated by Horace's psychological testing, would indicate that he is easily influenced by others, and can easily be cajoled, persuaded, ordered or intimidated into performing actions that would be detrimental to him. He would not have the judgmental

capacity to understand this, and this would affect his interpretation and understanding of the long-term consequences of his behavior.

Dr. Whyte and Dr. Bachman concur:

The diagnosis of schizophrenia, while demanded by the classic symptomatology manifest by Horace Butler is further supported by a family history of the disorder (Appendix #13), and by certain typical neurologic signs and symptoms (Appendix #17).

Report of Dr. Alec Whyte.

It is quite possible though less certain that Mr. Butler suffers from schizophrenia. Much of the clinical history provided for my review would be consistent with that diagnosis. The quality of the auditory hallucinations reported by the patient would also be consistent with that diagnosis. However, it also is likely that the neurological process producing the mental retardation makes the patient susceptible to psychotic symptoms from time to time.

Report of Dr. David Bachman.

iv) Evidence Regarding Poverty.

By fortuity or fate, Horace Butler's life was devastated by poverty, isolation, and mental disabilities. The sixth of ten children born to Sammy Lee and Annie Lee Butler, Horace was born sometime in October, 1958, near Adams Run, in a rural, black community in South Carolina's Low Country. Horace Butler's exact date of birth, like those of many of his brothers and sisters, is unreported. His illiterate father and mother reported their children's births as best they could to local white clerks who, unfortunately, were unable to understand Gullah dialect. Affidavit of Annie Lee Butler; Appendix 4. Family birth certificates report a hodgepodge of names and birth dates for the ten children,

assigning incorrect and duplicate names to almost half of them. Mrs. Butler's "X" marks each birth certificate. Family birth certificates; Appendix 5.

Horace's father, Sammy Lee Butler, Sr., attended school through the seventh grade, when at age 13 he had to leave to work in the fields. Annie Lee Butler, Horace's mother, never attended a day of school or learned to read and write. After their marriage in 1952, the couple worked in whatever field and common labor jobs they could find. Affidavit of Annie Lee Butler; Marriage certificate; Appendix 6. A new baby came just about every year up to Horace's birth, all born at home with no medical care and attended only by Mr. Butler's aging grandmother. Affidavit of Annie Lee Butler; Birth certificates.

Most likely, Horace was born mentally retarded and brain damaged from the ravages of alcohol his mother regularly drank, the chronic malnourishment she endured, her repeated exposure to neurotoxic pesticides, and the complete absence of any medical care throughout her pregnancy with him. Reports of David Price, Ph.D.; Alec Whyte, M.D. Whatever the origins of his mental disabilities were, the child faced unrelenting poverty and harshness that threatened his very survival throughout his developmental years.

His parents were barely able to eke out a marginal existence for their family, despite their hard labor and effort. At the time of Horace's birth, the eight-member Butler family lived in a two-room shack which had no electricity, indoor plumbing or glass

windows. They paid seven dollars a month in rent. Cold and rain poured through the holes and gaps in the floor, walls and ceiling. Wood rats infested the house and gnawed on the children in their sleep. Kerosene lamps provided the only light at night and were used sparingly because of their cost. The family subsisted on flour, cornmeal, and beans, unable to afford necessary items like meat, diary products, and vegetables. As an infant, Horace was fed watered down canned milk; as he grew older, he had no milk. Affidavit of Annie Lee Butler.

The children were dressed in rag shifts and went barefoot. As the boys in the family grew older, they wore ragged and donated pants. When it was cold, they had no warm jackets to wear. Sometimes the children wore two or more shirts to try and keep warm in the winter; mostly they stayed inside the shack, huddled around a wood stove. Affidavit of Annie Lee Butler. In 1961, Horace's sixth sibling, James, became the first Butler infant born in a hospital. Birth records, James Butler; Appendix 7.

When Horace was a three-year-old toddler, his older brother was hit by an automobile and seriously injured. A Charleston attorney, Robert Wallace, represented the family in a civil suit, and remembers the destitution of the family:

> The Butler home was really nothing more than a shack in the woods. The entire family was devastatingly poor and it was clear they struggled unsuccessfully for the basic necessities of life. The family needed help with food, shelter, and clothing. . . .The family lived in tragic circumstances, as poor as people can get and still live.

Affidavit of Robert Wallace and Photograph; Appendix 8.

Alcohol consumption and intoxication pervaded the Butler household and resulted in familial violence and neglect which tormented and scarred Horace. Mr. Butler drank at least a quart of "scrap-iron"--illegal whiskey--daily, and had explosive episodes of violence during which he assaulted and attacked his wife. Medical records, Sammy Lee Butler, Sr.; Appendix 9. When Horace was only five, his father shot his six month pregnant wife and almost killed her. Medical records, Annie Lee Butler, Appendix 10. Mr. Butler, desperate to earn any income to feed his family, made and sold illegal whiskey throughout the rural community. In a good week, he made $15.00. He used his sons as free labor to produce the moonshine in stills in the back woods. By the age of nine, Horace assisted his older brother Sammy, Jr., and they stayed up night after night tending to the fires necessary to cook the illegal whiskey. Sammy, Jr., added a new dimension to Horace's exposure to alcohol and gave the child baby food jars of moonshine to drink to cut the chill of the nights. Mr. Butler, afraid of law enforcement, stayed at home and left fourteen year old Sammy, Jr., in charge of the still. Affidavit of Sammy Lee Butler, Jr.

Mr. Butler, his wife, and children farmed themselves out as laborers and field workers for starvation wages. He cut and hauled wood and sold it to people in the area. Mrs. Butler worked in the fields, picking and planting tomatoes. As soon as Horace was five or six years old, he went along with his mother to help her. They were paid by the day. If it rained and they were unable to work

the fields, the children went to bed hungry. If it didn't rain, Mrs. Butler and Horace worked from sun up to sun down in the parching heat in the fields. The tomatoes and fields were covered in pesticides that they breathed into their lungs and that soaked into their skins. At the end of the day, Horace displayed symptoms which accompany pesticide poisoning--headaches, nausea, and weakness. On some days, Horace was too weak from the previous day's exposure to the pesticides to return to the fields with his mother. Affidavit of Annie Lee Butler.

He stayed home on those days with the other children too small or sick to work, watched over by his older sister, Lessie Mae. Although Lessie Mae loved Horace and tried to protect him and the other children in her care, she was in no way equipped to care for the children. Only a child herself, she tried to see that the children didn't injure themselves and kept a special watch on their sister, Jeanette, who had seizures. When Jeanette had seizures, Lessie Mae and the other children gave her turpentine for medicine. With no money for basic necessities of life such as food and adequate shelter, the family was forced to rely on home remedies for chronic illnesses that plagued them. Horace was 12 years old before he ever saw a doctor, and then it was in an emergency room for treatment of a head injury he received from a fall. Affidavit of Annie Lee Butler.

Horace and his siblings somehow survived their early childhood years despite hunger, backbreaking labor in the fields, no medical

care, and housing that offered little protection against the elements. Education for any of the children was an indulgence the family could not afford. Each child's labor was needed in the fields and back woods as soon as they were physically capable of helping one of their parents. Shoes and clothing for school were beyond the means of the family for all the children. In 1962, however, Mr. and Mrs. Butler tried to send their oldest child, ten year old Sammy, Jr., to the nearest school. They enrolled him in the first grade, but he failed all his subjects before withdrawing. In 1965, Sammy, Jr., enrolled in school again, and this time was placed in the second grade at the age of 13. It was his last effort at education. In 1967, the family tried again and sent the next oldest boy, 14 year old Henry, to school, where he enrolled in the second grade and failed all his subjects. Both Henry and Sammy were able to attend classes only two months out of the academic year. As the oldest and strongest children, their hands were needed in the field. School records, Sammy Jr., and Henry Butler; Appendix 12.

By 1970, the family finally scraped together enough money to clothe some of the children and send them to the nearest school. It was too late to do Horace much good. At the age of 12, Horace was enrolled in the first grade along with four other siblings. He attended school until he was 16 and withdrew at the end of the third grade, still unable to do much more than read and write a few simple words.

As the children grew older, they left the home and started life on their own, except for Horace. From his earliest childhood years, Horace stayed close to his parents, following the footsteps of his mother and father. His siblings teased him as he grew older about his dependency, but life away from them was unfathomable for him. Even as a young adult, he slept in their bedroom. His mother and father knew he was slower than the other children and simply accepted his limitations as part of life. Although the other children were beaten frequently by Mr. Butler, he had no trouble with Horace and raised his hand to him only once. When Mr. Butler became drunk and violent, Horace fled to the safety of another room or sat outside the house, waiting for the violence to pass. No one in the family entertained any thought that Horace would someday leave his home and live on his own. Affidavits of Annie Lee Butler and Sammy Butler, Jr.

By the time Mr. Butler was in his early forties in 1976, his body was destroyed by the ravages of whiskey and he was no longer able to work. Hospital records, Sammy Butler, Sr. He relied on his sons to bring in necessary income. Horace dutifully worked in jobs arranged by Mr. Butler, cutting wood for people in the area. He still slept in his parent's bedroom. If he arrived home after sundown, he waited in the car for someone inside the house to come out and escort him inside. He was terrified of the dark. Affidavits of Annie Lee Butler and Sammy Butler, Jr. Although everyone in the family recognized that Horace had special problems

and would never be able to leave home, none of them had the resources to give him the special care and attention he needed.

The years of drudgery, bare survival, and ignorance took their toll on the family. The second oldest child, Henry, fell prey to mental illness as a teenager and has twice been institutionalized in the state psychiatric institution. Hospital records, Henry Butler; Appendix 13. Another brother, James, was left a paraplegic after a logging accident and is confined to a wheelchair. Medical records, James Butler; Appendix 14. Willie, the third oldest son, was stabbed to death in a fight over a girlfriend. The sisters in the family fared a little better than the brothers, but each of them began to have children early in their teens. Jeanette, the sister with seizures, had her first baby when she was only 12. Virginia's first child died when she was only a few months old. Affidavit of Annie Lee Butler.

By the time Horace was charged with murder and went to trial, the family went to the only attorney they knew in their community, Mackie Hill. Unaware that the tragic story of Horace's life, his multiple disabilities, or their struggle for survival had any meaning other than their due, the family sat silently as Horace was sentenced to death.

> c. Counsel's failure to investigate, prepare or present available mitigating evidence was unreasonable and creates a reasonable probability that if the evidence had been presented, the applicant would have received a sentence of life imprisonment rather than the death penalty.

Horace Butler's mental retardation, brain damage, mental

illness and the horrible poverty that pervaded his life are not just matters that might have evoked sympathy on his behalf from the sentencing jury. Rather, Horace Butler's mental disabilities are directly relevant to a number of statutory and non-statutory mitigating circumstances. In short, they greatly reduce his moral culpability for the charged offense because they necessarily affected his mental state at the time of the offense. As Dr. Price notes:

> The complexities of Mr. Butler's disabilities are relevant to any sentencing determination in his case, and are especially relevant to several of the statutory mitigating circumstances set forth in the South Carolina death penalty statute. At the time of the offense, Mr. Butler was under an "extreme mental and emotional disturbance." His multiple mental handicaps have profound effect on his ability to plan, direct or control his behavior in a rational manner, especially in stressful or confusing situations. He simply lacks the ability to deal in a rational way with crises, and his emotional disturbance makes it very difficult for him to mediate his behavior when confronted with confusing and frightening situations.
>
> His "capacity to appreciate the criminality of his conduct or to conform his conduct to that required by law or expected by society was substantially impaired." He has great difficulty evaluating his own behavior, thinking of alternative or appropriate courses of action, and recognizing long term consequences of his actions. His limited intellectual skills, in combination with his brain damage and mental illness, leave him unable to conceptualize future events. His fund of information and ability to abstract and/or generalize are simply too low for him to understand abstract concepts. He is easily confused and misunderstands all but the most basic ideas. He has lapses and distortions in his thought processes that disrupt his ability to respond in logical ways. His inability to understand the consequences of his action, to respond appropriately to emotional stress and to plan goal-directed activity are factors that govern his day-to-day life

Mr. Butler's mental functioning at the time of the offense belies his chronological age of 21. Thus his "mentality" is certainly a mitigating factor. His intellectual functioning is below the level of a third grader, and his social adaptation is even more impaired. He never functioned independently as an adult and relied entirely on his parents to help him meet the basic necessities of life such as shelter and food. He is emotionally and intellectually impoverished, with a simplistic, child-like view of events around him.

In addition to the statutory mitigating circumstances referred to above, Horace Butler's mental retardation and organic condition affect his culpability for the crime he was sentenced to death for committing in other important respects as well. Mr. Butler's cognitive abilities are impaired. His ability to retain, comprehend and process information is severely limited. The same is true of his ability to accurately assess a situation and to make appropriate choices. Similarly, his ability to understand and appreciate the consequences of his actions is impaired. He thinks only in the most concrete of terms and does not understand abstract terms and concepts. As a result of these various impairments, his moral capacity and appreciation are severely limited. This is so because Mr. Butler simply does not have the ability to understand or appreciate most moral concepts.

Additionally, his mental retardation makes Mr. Butler more likely to act impulsively and without due regard for the consequences of his actions. His ability to plan a course of conduct, deliberate and premeditate are also substantially impaired. These impairments, in combination with his cognitive impairments and its subsequent limitations on his ability to understand moral concepts, affects his ability to act volitionally as the term is generally understood.

Report of David Price. Dr. Alec Whyte reached similar conclusions:

At the time of the offense, Horace Butler suffered from moderate mental retardation, pervasive developmental disorder and/or the childhood precursors of adult schizophrenia and probably a number of specific developmental disorders. The melange of relevant symptoms include social withdrawal, passivity, dependence, severe communication, reasoning and information-processing defects, phobias, suggestibility, high reactivity to stress and faulty judgment. His cognitive abilities and ability to act volitionally are

> also impaired. Such constellation of impairments is inconsistent with a planned, premeditated act and understanding the significance and long-term consequences of his actions. It would be more consistent with being talked into some ancillary role, but the force of the request would have to overcome the existing phobias and terrors. Such an event would constitute such a severe stressor for Horace Butler that immediate signs and symptoms of decompensation should have ensued.

Report of Dr. Whyte.[20] Dr. Whyte goes on to note that had trial counsel taken the simple step of having an evaluation conducted, this wealth of mitigating information would have been discovered at the time of Horace Butler's trial.

> It is inconceivable that a qualified mental health expert would have evaluated Horace Butler and not found the presence of these severe mental disabilities had an evaluation been conducted prior to his trial. An evaluation would have revealed the presence of a number of mitigating circumstances relevant to Horace Butler's mental state at the time of the offense, including several of the statutory mitigating circumstances set forth in the South Carolina death penalty statute. The mitigating circumstances arising out of his combination of mental dysfunctions are relevant to a proper understanding of his involvement in and moral culpability for the offense.

Report of Dr. Alec Whyte.

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[20]Again, the results of the neurological evaluation support the psychiatrist's and psychologists's findings.

> Mr. Butler is impaired in virtually every realm of intellectual function. His poor memory and analytic reasoning skills severely limit his understanding of his environment. Based on these examinations, he would have significant difficulty weighing the pros and cons of potential alternative actions. His judgement is impaired, and he would lack the ability on his own to make decisions about complex problems.

Report of Dr. David Bachman.

Additionally, these mental disabilities are directly related to a number of other trial concerns, including Horace Butler's ability to comprehend and understand the significance of basic trial rights, such as the right to counsel or the right to testify. As Dr. Price notes:

> Horace Butler's impairments would also have serious effects on his interactions with law enforcement personnel and the judicial system. It would, for example, be extremely difficult for Mr. Butler to understand and appreciate the Miranda warnings. Even assuming he could understand the right to counsel, he would not appreciate the danger in talking to the police without the assistance of an attorney. He would also be easily frightened and intimidated during interrogation. Furthermore, he would be likely to attempt to please an authority figure such as a police officer, even if it were to his detriment to do so. Thus, as a result of these impairments, both the circumstances and content of any statements given by Mr. Butler to law enforcement personnel should be examined critically.
>
> Horace Butler's impairments would also make it difficult for him to assist his attorney. As was previously mentioned, he is an extremely poor historian. He has no understanding of the mechanics of a trial or what information is beneficial or relevant. He certainly has no understanding of the concepts of aggravation or mitigation, and would not be able to assist his attorney in investigating, developing, and presenting useful information. However, due to his compliant nature, which is an associated feature of his mental retardation, he would likely acquiesce in any course of conduct pursued by his attorney. He would do so with little or no understanding of whether it was in his best interest to do so.
>
> Mr. Butler also would comprehend very little of what transpired in the courtroom. Due to the speed at which testimony occurs and the language used, it is likely that Mr. Butler did not understand much of what occurred at his 1980 trial, or in any subsequent legal proceedings he was involved in. His memory impairment would exacerbate his cognitive limitations in this regard.

Report of Dr. Price. Dr. Whyte concurs:

On both a biological and functional basis, Horace Butler was mentally, emotionally and socially incapable of a minimal adult reasonable response to the questioning of the police after his arrest. Here the symptoms of cognitive impairment would clearly preclude any real understanding of the process or his rights, even vulnerability to suggestion would further complicate his attempt at compliance.

Report of Dr. Alec Whyte.

It is also important to note that due to Horace Butler's mental retardation and brain damage the reliability of his statements to the police must be critically examined. Dr. Bachman noted that one of the features of Horace's multiple impairments is that he confabulates, or makes up details he can not remember with little or no thought to the consequences of doing so.

> Of particular relevance to Mr. Butler's situation, is the result of some of the mental status testing that was performed today. One of Mr. Butler's particular areas of weakness has to do with the comprehension of auditory verbal material. In particular, when presented with a simple narrative, such as a brief story, the patient is able to process very little of this information. Although he is able to take in very salient details, he very often misses important facts within the story. He compensates for this by "filling in details" as best as he can. In other words, he makes up parts of the story in order to compensate for his inability to take in the complete story. Once he creates this story, this then becomes the story that he remembers and that has reality for him. It is quite likely that he has compensated his entire life in this fashion. <u>That is, when confronted with complex situations that he is unable to comprehend, he tends to fill in the gaps with details that make some sense to him whether they may be true or not.</u> This is not a volitional process on the patient's part; in my opinion this is simply the response of a limited individual who is frequently overwhelmed by the world around him.

Report of Dr. Bachman (emphasis added). Dr. Price concurs:

> Horace's Dementia on top of his retardation will cause him severe impairment. The Demential causes impairment in short-and long-term memory, attention, and concentration. Dementia superimposed on his retardation is reflected in his lowered cognitive skills such as his fund of general knowledge, long-term memory for facts, knowledge of word meanings, expressive vocabulary, common sense reasoning, social judgment, ability to abstract and see relationships, ability to evaluate social relevance of situations, and his ability to anticipate the consequences of his actions. You will find him at the 1 percentile or less on all these skills, given that the tests will only go down to the 1 percentile. The Dementia and retardation significantly affect his critical judgment, and leave him unable to anticipate the consequences of his actions or have the mentality to appreciate them. DSM -III-R specifically says about Dementia, "The essential feature of Dementia is impairment in short- and long-term memory, associated with impairment in abstract thinking, impaired judgment, and other disturbances of higher cortical function or personality change." DSM-III-R also goes on to state, "Impaired judgment and impulse control are also commonly observed," and that "people with Dementia are especially vulnerable to physical and psychosocial stressors. Again, I found these characteristics to be present in Mr. Butler. These two conditions, Retardation and Dementia, are chronic in nature. The situation that he has been in, such as the circumstances and events that led to his actual arrest, questioning, and trial, are stressors enough to have aggravated his intellectual deficits and caused further regression, most likely reflected in lowered mentality, passiveness, submissiveness, and lowered judgment. These would increase the likelihood that he would be easily influenced by others.

As was demonstrated previously in this pleading, counsel's reasons for failing to investigate, prepare or present mitigating evidence are not only unreasonable but patently so. Not only was counsel's conduct unreasonable, there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The available mitigating evidence, set forth in detail in the

reports of the examining mental health professionals contained in the appendix to this pleading was overwhelming. Had this compelling evidence been presented to the sentencing jury, Horace Butler would, in all likelihood, have received a sentence of life imprisonment.

Due to trial counsel's failure to investigate or present available mitigating evidence, the sentencing jury was not given the opportunity to consider Horace Butler's mental retardation, brain damage, mental illness and his background of poverty and abuse as mitigating factors. As was true in Eddings v. Oklahoma, the sentence of death in Horace Butler's case was imposed without consideration by the sentencers of "particularly relevant . . . mitigating factor(s) of great weight." Eddings, 455 U.S. at 115-116.

The available mitigating evidence surveyed in this pleading is precisely the type of evidence which would warrant a sentence less than the death penalty. The sentencing jury, however, knew nothing of the devastating effects of Horace's combination of mental dysfunctions on his moral blameworthiness. Therefore, the jury's "highly subjective, unique, individualized judgment," Turner v. Murray, was horribly and prejudicially skewed. The decision to impose the death penalty was made without the benefit of the most relevant sentencing information. Due to counsel's errors, the penalty phase of applicant's trial did not facilitate the reliable exercise of the jury's sentencing discretion. Caldwell v.

Mississippi, 472 U.S. at 329. Certainly this evidence creates "a reasonable probability that absent [counsel's] errors the jury . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant [the] death [penalty]." Strickland v. Washington, 466 U.S. at 695. For all these reasons, applicant is entitled to post-conviction relief.

9(B). Because of the specific aspects of Horace Butler's mental retardation and its effect on his moral culpability and personal blameworthiness, his individual sentence of death violates the United States and South Carolina Constitutions.

In Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989), a five-Justice majority of the United States Supreme Court held that the Eighth Amendment did not categorically prohibit the execution of all mentally retarded persons. The Court determined that at least as of June of 1989, there was "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." Much has transpired since the Court's ruling to indicate a rapidly-developing national consensus against sentencing mentally retarded people to death[21], and these events may now or in the near future

[21]For example, at the time of the Court's decision last year, only one state, Georgia, prohibited the death penalty from being imposed upon mentally retarded persons. Since that time, however, Kentucky, and Maryland have enacted bans against the execution of persons with mental retardation. A number of other states, including South Carolina, currently have similar legislation pending. The United States Senate also included a prohibition against the execution of persons with mental retardation in recent legislation expanding of the scope of the federal death penalty.

compel a difficult Eighth Amendment result. But in this section of his application for post-conviction relief, Horace Butler is not asserting that no mentally retarded person can be put to death. Rather, his contention is more specific, and in some respects more basic. Due to the severity and specific characteristics of Horace Butler's mental retardation, and its effects on his moral blameworthiness, applicant asserts his individual death sentence is not only unjust but unlawful under the Eighth Amendment principles of Penry.

The Penry Court acknowledged the possibility that a particular mentally retarded defendant's death sentence may, under certain circumstances, violate the Eighth Amendment to the United States Constitution. The majority stated:

> [We] cannot conclude that all mentally retarded people of Penry's ability--by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility--inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.

109 S.Ct. at 2957. Thus, the Court implicitly recognized that a death sentence imposed upon an individual mentally retarded offender may violate the Eighth Amendment, depending on the particular respects in which the individual's mental retardation

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S. 1970 (May 24, 1990).

affects his moral culpability.[22]

Under the facts of applicant's case, such a showing can be made. As was set forth in detail in Section A of this pleading, Horace Butler is a very severely disabled person. He is mentally retarded, and his mental retardation directly affects his moral culpability. The reports of the mental health professionals who evaluated him, and which are contained in the appendices to this application, reveal that Horace Butler has the mental age of a young child. Furthermore, his mental retardation directly affects and seriously diminishes his ability to understand and appreciate concepts involving higher level abstract reasoning. In short, he thinks only in the most concrete of terms, and lacks the ability to understand and appreciate cause and effect, the consequences of one's actions, and other concepts which are directly related to an individual's culpability for a criminal offense. In the language of Penry, Horace Butler lacks the "cognitive, volitional and moral capacity to act with the degree of culpability associated with the death penalty." 109 S.Ct. at 2957.

Many of the reasons that Horace Butler's mental retardation so diminish his moral culpability as to make the death penalty a wholly inappropriate punishment have already been set forth in ground A of this application, and will not be repeated in detail

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[22]In Penry, no individual showing was made or attempted. Rather, Penry only involved the issue of whether there was a categorical Eighth Amendment ban against the execution of all persons meeting the clinical definition of mental retardation.

in this section of the pleading. Rather, applicant will attempt to address the concerns of the Penry court as they relate to his case. Again, as was true in ground A, the opinions of the experts who evaluated him are relevant to a proper disposition of this claim.

1. Horace Butler's Mental Retardation Dramatically Limits His Cognitive Abilities.

Many of the specific ways in which Horace Butler's cognitive abilities are affected are set forth in the reports of the mental health professionals who conducted the evaluations in this case. Not only is his fund of information and knowledge of basic facts impoverished, but his capacity to learn, understand, remember and reason are all severely impaired. He is, in short, a perpetual child in most critical respects. For example, Dr. Whyte notes:

> The melange of relevant symptoms include social withdrawal, passivity, dependence, severe communication, reasoning and information-processing defects, phobias, suggestibility, high reactivity to stress and faulty judgment.

Report of Alec Whyte, M.D. As a result of these limitations, Horace Butler's "cognitive abilities and ability to act volitionally are severely impaired." Id. Dr. Price agrees that "Mr. Butler's cognitive abilities are impaired." Report of David Price PhD. He goes on to note that: "[h]is ability to retain, comprehend and process information is severely limited. The same is true of his ability to accurately assess a situation and to make appropriate choices." Id.

2. Horace Butler's Mental Retardation Limits His Ability to Act Volitionally.

The examining experts all recognized the effects Horace Butler's mental retardation has on his ability to control his impulses and to understand and fully appreciate cause and effect and similar concepts related to personal responsibility for one's actions. As Dr. Price notes:

> [H]is mental retardation makes Mr. Butler more likely to act impulsively and without due regard for the consequences of his actions. His ability to plan a course of conduct, deliberate and premeditate are also substantially impaired. These impairments, in combination with his cognitive impairments and its subsequent limitations on his ability to understand moral concepts, affects his ability to act volitionally as the term is generally understood.

Report of David Price, PhD.; see also Report of Alec Whyte, M.D.

3. Horace Butler's Mental Retardation Severely Limits His Moral Capacity.

As a result of his mental retardation, Horace Butler does not understand many basic moral concepts. As has been noted previously, his ability to understand, remember, and reason are all substantially impaired. Similarly, his ability to understand and appreciate the consequences of his actions is impaired. In fact, Horace Butler thinks only in the most concrete of terms and does not understand abstract terms and concepts. See Report of David Price, Ph.D.

> As a result of these various impairments, his moral capacity and appreciation are severely limited. This is so because Mr. Butler simply does not have the ability to understand or appreciate most moral concepts.

Id. Similarly, Dr. Whyte notes that ."[s]uch constellation of

impairments is inconsistent with a planned, premeditated act and understanding the significance and long-term consequences of his actions." Report of Alec Whyte, M.D. In short, his moral capacity is that of a small child.

4. As a result of these impairments, Horace Butler is not a "death eligible" individual.

For these reasons, Horace Butler is precisely the type of individual the United States Supreme Court was referring to when it recognized that a death-sentence imposed upon a particular mentally retarded defendant may violate the Eighth Amendment. He does not have the requisite degree of culpability to justify the imposition of a sentence of death, and thus carrying out the death sentence in his case would serve no legitimate penological purpose. As a result of his severe limitations, executing Horace Butler would be an empty spectacle without any deterrent or retributive value. Rather, it would only be a meaningless act of vengeance; an act carried out in the face of compelling facts which have never been presented to any sentencer or court with the authority to spare Horace Butler's life. Basic fairness mandates that his sentence be vacated and a sentence of life imprisonment imposed. Alternatively, the minimum remedy consistent with the reliable exercise of our society's power to take another individuals' life, is that Horace Butler must be given an opportunity to present the evidence of his mental retardation to a sentencing body. For all these reasons, Horace Butler's sentence of death must be vacated.

9(C). The solicitor's closing argument at the penalty phase of applicant's trial improperly injected the personal opinion of the solicitor as to the appropriateness of the death penalty, and thus diminished the jury's responsibility for determining applicant's sentence in violation of the Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law.

The solicitor's closing argument contained several prejudicial and improper comments which deprived applicant of a fundamentally fair sentencing trial and which violated the Eighth and Fourteenth Amendments to the United States Constitution. The solicitor specifically interjected the opinion of his office as to the appropriateness of the death penalty. He stated:

> Ladies and gentlemen, Mr. Charles Condon, who is your solicitor of this county and of Berkeley County, that is whose hands it rested in to make the decision on whether or not to seek the death penalty. Also in his hands rests the responsibility of law and order in this community, of protecting the people, of deterring crime, indeed of preserving a civilized way of life. And he made this decision. This crime is not someone getting made at someone and in a one time moment shooting them. This is not someone being jealous over something and in a one time moment shooting them. This is a crime between that man who murdered and submitted to a nightmare a stranger, a perfect stranger. She was doing the most ordinary of all things, she was just going home. She had just done the ordinary of all things. She was just working. She was going home and that man subjected her to that terror and ended her life, took her away from all of us. This is not easy. It hasn't been easy for any of us all week and, of course, it is not going to be. It is not something any of us enjoy. We haven't enjoyed it all week, but I ask you without reservation to return the sentence of death. I ask you to on behalf of Pamela Lane, I ask you for her family, but most important, I ask you for this community to cry out in outrage that this has got to stop if we are going to be able to live any kind of normal existence.

Tr. 1014, line 20 to tr. 1015, line 18.

To conform to the requirements of due process, a solicitor's closing argument at the penalty phase of a capital trial must be strictly confined to the record and its reasonable inferences, and must narrowly focus on the characteristics of the defendant and the nature of the crime. Furthermore, the argument must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. See, e.g., State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988), modified (August 29, 1988); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988); State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987); State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986). The purpose of these repeated admonitions is clear. To permit extraneous and prejudicial remarks at the conclusion of the penalty phase of a death penalty proceeding undermines the reliability and consistency of the sentencing process required by the Eighth and Fourteenth Amendments.

The South Carolina Supreme Court has consistently defined and limited the parameters of a solicitor's sentencing phase argument. For example, in State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982), the Court found the following argument by the solicitor during the sentencing phase to be improper:

> Some people have done that. The legislature did it when they passed the death penalty law. The governor did it when he signed it into being. The officers did it when they signed the arrest warrant. The grand jury did it when they signed this indictment. I did it when I signed my name on the Notice informing them the State would seek

> the death penalty. And you're being called on now . . . . The people before you have signed their names . . . . Would you do like others and sign your name . . . .?

278 S.C. at 441. Similarly, in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), the Court held that the solicitor improperly injected his personal opinion into the jury's deliberations with the following comments:

> I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the death penalty . . . . So, you see, you are not alone in your decision. I have already made that decision . . . .I made that decision some months ago. And if I can do it, you can [do].

278 S.C. at 538. Furthermore, in State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981), the Court held that the solicitor's closing argument minimized the jury's sense of responsibility for applicant's fate by stressing that he had himself already made the same decision that he was now asking them to make.

> When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C. Code §16-3-25(C)(1), and by the Eighth Amendment to the United States Constitution. Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980).

277 S.C. at 175.

These three decisions are part of an unbroken series of decisions by the Supreme Court condemning arguments containing personal opinions of the solicitor. See also State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979) (solicitor's jury argument to the effect that death sentence would be reviewed by appellate courts

improperly lessened jury's sense of responsibility for defendant's fate and required reversal of sentence); State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) (jury argument concerning availability of appellate review required reversal); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) (reversal required due to solicitor's jury argument that judge could "ignore" jury's recommendation of death, and that solicitor would never seek the death penalty again if jury failed to impose it in this case); State v. (James) Butler, 277 S.C. 543, 290 S.E.2d 420 (1982) (solicitor improperly attempted to minimize the jury's sense of responsibility for defendant's fate by stressing that he himself had already made the same decision he was asking them to make); State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), cert. denied, 460 U.S. 1088 (1983) (solicitor improperly drew attention to his own decision to seek the death penalty: "Jurors are simply not to consider the opinions of neighbors, officials or even other juries"). Furthermore, these principles have been applied in post-conviction proceedings. See Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984) (defendant entitled to a new sentencing trial due to the solicitor's improper argument which referred specifically to his own decision to seek the death penalty in this case).

The correctness of these decisions is further borne out by the United States Supreme Court's holding that a prosecutor's argument which diminished the jury's sense of responsibility for determining whether a capital defendant should receive the death penalty

violated the Eighth Amendment's requirement of reliability in capital sentencing. In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court held that a prosecutor's jury argument, which suggested that the state supreme court would review the appropriateness of any death sentence which the jury might impose, violated the Eighth Amendment. The Court concluded that this type of argument was intended "to minimize the jury's sense of responsibility for determining the appropriateness of death," and that such tactics created a constitutionally-intolerable risk of unreliability in the sentencing process. Id., 472 U.S. at 330-334, 341.

The comments given by the solicitor in applicant's case are indistinguishable from the remarks condemned by the South Carolina Supreme Court in State v. Sloan, State v. Koon and State v. Woomer. The assistant solicitor stated that the solicitor for Charleston County, the person responsible for protecting all the citizens of the county had already made the decision that Horace Butler should die. Thus, this argument attempted to "minimize the jury's sense of responsibility for appellant's fate by stressing that many others had already made the decision he was asking them to make." State v. Sloan, 278 S.C. at 440; see also State v. Woomer, 277 S.C. at 175. In applicant's case the solicitor made this same point: "Mr. Charles Condon, who is your solicitor of this county and of Berkeley County, that is whose hands it rested in to make the decision on whether or not to seek the death penalty. . . . And

he made this decision." Tr. 1015 (emphasis added). The intended purpose of this argument was to inform the jury that it was not ultimately their responsibility to decide whether applicant lived or died because the solicitor and chief law enforcement officer of the county had already made that decision for them. The argument was successful in its intended purpose and undoubtedly played a role in the jury's sentencing decision. Therefore, because the state's summation violated basic principles established by the South Carolina Supreme Court and the United States Supreme Court, applicant is entitled to post-conviction relief.

9(D). The trial court's sentencing phase instructions could have been interpreted by the jury to require that its findings regarding the existence of mitigating circumstances be unanimous in violation of the Eighth and Fourteenth Amendments to the United States Supreme Court United States Constitution.

The trial court's sentencing instructions improperly created the impression that the jury must unanimously agree on the existence of a mitigating circumstance or circumstances before it could be considered in the jury's sentencing calculus. Several aspects of the court's charge served to create this erroneous and unconstitutional impression. First, the trial judge emphasized that the jury's verdict must be unanimous and that the aggravating circumstances must be established beyond a reasonable doubt.

> Mr. Foreman, either of these verdicts, live [sic] imprisonment or death, must be unanimous. All twelve of you must agree to one of those verdicts.

Tr. 1030, lines 15-17.

> [I]f . . . each of you twelve agree that the defendant should be sentenced to death, Mr. Foreman, there is a

place here under which you would make a finding . . . of the statutory circumstance which you found to exist . If you find it unanimously, write it here. Then every member of the jury must sign the penalty on the verdict if it be the death penalty.

Tr. 1031, lines 1-12.

If you conclude under the evidence before you and the law as I have explained it to you that the defendant should be given the death penalty, you will use the form which has the place for every member of the jury to sign his or her name which states that you assent and agree that the proper verdict in this case is the death penalty.

Tr. 1030, lines 20-25.

The trial court also emphasized in its penalty phase instructions to the jury that it must unanimously agree beyond a reasonable doubt as to the existence of a statutory aggravating circumstance.

Since it is absolutely necessary for the state to prove to you beyond any reasonable doubt the existence of the statutory aggravating circumstance on which it relies in seeking the death penalty, it would be your first consideration has the state proven to you beyond a reasonable doubt all of the material elements . . . of the crime of rape or the act of rape and has it proven them to you beyond a reasonable doubt. If the state has proven the existence of the statutory aggravating circumstance on which it relies beyond a reasonable doubt, you may consider imposing the death penalty on the defendant.

Tr. 1027, line 17 to tr. 1028, line 2.

You are now going to be required to make a determination as to whether the state has proven by the evidence which it has already put in and which is properly before you, and that is what you will make your inquiry relative to, have they proven by that evidence beyond a reasonable doubt every material element of the act of rape. Bear in mind that they must prove the existence of those elements beyond a reasonable doubt and you will recall from my earlier instructions the definition of reasonable doubt, that it is not a fanciful, not a whimsical, but

a substantial doubt for which an honest person seeking the truth can give a real reason.

It is that degree of proof that the state must at this stage of the trial must prove to you every material element of the act of rape.

Rape is the unlawful carnal knowledge of a woman forcibly and without her consent. Those are the elements which the state must prove to you beyond a reasonable doubt as being the aggravating circumstance on which they rely.

Tr. 1022, lines 6-23.

[T]he defendant is entitled to a finding by you ladies and gentlemen that he did not commit the act of rape unless the state has established beyond a reasonable doubt that the defendant had sexual intercourse with the decedent by force and without her consent.

Tr. 1024, lines 10-15.

The state must prove [the three elements of rape] to you beyond any reasonable doubt, as I have explained that term to you. . . . The law presumes right now that he is innocent of the act of rape and it would only be in your deliberations on the facts in applying the law as I have given it to you that you become convinced beyond a reasonable doubt that he committed the act of rape that you could move forward with your deliberations.

Tr. 1025, lines 1-11.

To the extent that the state relies on circumstantial evidence to establish any particular fact, it must prove all the circumstances relied on and it must prove them beyond a reasonable doubt.

Tr. 1026, lines 1-4.

Since it is absolutely necessary for the state to prove to you beyond any reasonable doubt the existence of the statutory aggravating circumstance on which it relies in seeking the death penalty. it would be your first consideration has the state proven to you beyond a reasonable doubt all of the material elements . . . of the crime of rape or the act of rape and has it proven them to you beyond a reasonable doubt. If the state has proven the existence of the statutcry aggravating

> circumstance on which it relies beyond a reasonable doubt, you may consider imposing the death penalty on the defendant.

Tr. 1027, line 17 to tr. 1028, line 2.

The only logical construction of the instructions viewed in their entirety was that any and all subsidiary findings--including the existence vel non of a statutory mitigating circumstance or circumstances--must be unanimous. For example, the trial judge stated:

> If you find the existence beyond a reasonable doubt of the statutory aggravating circumstance and if you find, also, the existence of any mitigating circumstances which the defendant has submitted to you to rely on, you may return a verdict of the electric chair or you may return a verdict of life imprisonment.

Tr. 1028, line 22 to tr. 1029, line 2.[23] Thus, in their entirety, the trial court's instructions could have reasonably been understood to require that any finding of the existence of a mitigating circumstance or circumstances must also be unanimous. See McKoy v. North Carolina, ___ U.S. ___, 110 S.Ct. 1227 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

The most basic and consistently applied Eighth Amendment principle is that the sentencer in a capital case "may not be

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[23]The jurors were uniformly referred to as a group by the word "you." Anytime "you" appeared in the jury instructions, it logically and in fact applied to a unanimous jury finding. Even the instruction "should you not find, unanimously" an aggravating circumstance, the sentence will be life, reveals that "you" was used in the collective sense. A single juror (a "you") could not find anything unanimously, but a collective jury ("you") could. Similarly, the "you" that was to find mitigation had to be, or clearly could have been interpreted to require, the collective you.

precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (emphasis in original); see also Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978). Applying this principle, the United States Supreme Court in Mills v. Maryland, held that the use of a verdict form which required the jury to mark "yes" or "no" beside each mitigating circumstance, together with the trial court's instructions, may have precluded the jury from considering relevant mitigating evidence because the jury could reasonably believed that it was required to impose the death penalty if it unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance. Because the jury could have believed that its failure to unanimously agree on the existence of any particular mitigating circumstance prevented it from giving mitigating evidence any effect whatsoever, the instructions violated the Eighth Amendment. Thus the Court concluded that "the possibility that a single juror could block [the] consideration [of mitigating circumstances] and consequently require the jury to impose the death penalty, is one we dare not risk." 108 S.Ct. at 1870. Allowing a "'holdout' juror to prevent the others jurors from considering mitigating evidence violate[s] the principle in Lockett v. Ohio, . . . that a sentencer may not

be precluded from giving effect to all mitigating evidence." McKoy, 110 S.Ct. at 1231. Similarly, just this term, the United States Supreme Court invalidated the North Carolina capital sentencing scheme because it contained the same constitutional defects. See McKoy v. North Carolina.

The same constitutional defect is present in the instructions given in applicant's case. For example, six jurors may have thought that applicant's lack of prior criminal convictions involving the use of violence was a mitigating circumstance, while six other jurors may have believed that applicant's age or mentality was relevant mitigating evidence.[24] However, the jurors could easily have understood the trial court's charge to require that all twelve jurors agree that applicant had established the existence of a mitigating circumstance, and thus denied applicant the benefit of the consideration of both of these mitigating factors. See Mills, 108 S.Ct. at 1865-66. This inference of unanimity "allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a 'sentence less than death,'" McKoy, 110 S.Ct. at 1231 (citations omitted), and thus precludes the full consideration of mitigating circumstances.

The fact that the jury was at other points told that it could

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[24]Two additional mitigating circumstances were alleged by applicant: the victim was a participant in the defendant's conduct or consented to the act, and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

impose a sentence of life imprisonment regardless of whether it found the existence of a mitigating circumstance does not cure the constitutional error in the trial court's charge. There is no way to determine how the jury that sentenced applicant to death resolved the conflict in the trial court's instructions. See Francis v. Franklin, 471 U.S. 307, 315-16 (1985) (if the charge contains contradictory instructions, one of which is subject to an unconstitutional interpretation, correct explanations in other parts of the charge does not cure constitutional defect). Pursuant to Mills and McKoy, the question is not then could the instructions have been understood in a constitutional manner, but whether a reviewing court can say with confidence that the jury did not interpret the instructions in a manner that might have precluded the consideration of the available mitigating evidence. 108 S.Ct. at 1866-67.

> Our decision in Mills was not limited to cases in which the jury is required to impose the death penalty if it finds that aggravating circumstances outweigh mitigating circumstances or that no mitigating circumstances exist at all. Rather we held that it would be the "height of arbitrariness to allow or require the imposition of the death penalty" where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence.

McKoy, 110 S.Ct. at 1232 (emphasis original). Thus if it is possible the jurors interpreted the instructions to mean that "they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular mitigating circumstance," Mills, 108 S.Ct. at 1870, then applicant's death

sentence must be reversed. Because the instructions in this case were subject to this unconstitutional interpretation, applicant's sentence of death must be reversed.

IV. CONCLUSION

For the reasons set forth in this application, Horace Butler contends that he is entitled to post-conviction relief and that his convictions and sentence of death should be vacated. Alternatively, applicant requests that this Court conduct an appropriately scheduled evidentiary hearing.

Respectfully submitted,

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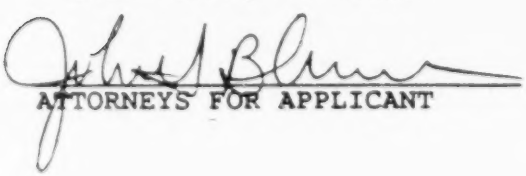
BY: 
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